Supreme Court of the United States

October Term, 1974

No. 74-551

H. CLIFFORD LEE, *et al.*,
Petitioners,

vs.

HERSCHEL S. ARROWOOD, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals For the Eighth Circuit

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November 4, 1974

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Supreme Court of the United States

October Term, 1974.

No.

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of Edyth Bush, a/k/a Edyth D. Bush, a/k/a Mrs. A.G. Bush, deceased,

Petitioners,

vs.

HERSCHEL S. ARROWOOD, individually and as a Co-Executor under the Last Will and Testament of Archibald G. Bush, deceased, and as a former director of The Bush Foundation; MARY JANE DICKMAN, individually and as a Co-Executor under the Last Will and Testament of Archibald G. Bush, deceased; CECIL C. MARCH, individually and as a director of The Bush Foundation; ELMER L. ANDERSEN, individually and as a director of The Bush Foundation; Honorable EDWARD J. DEVITT, individually and as a director of The Bush Foundation; RICHARD L. POST, individually and as a former director of The Bush Foundation; REUEL D. HARMON, individually and as a director of The Bush Foundation; THE BUSH FOUNDATION, a Minnesota Non-Profit Corporation, THOMAS MALONE, as Clerk of the Probate Court, Ramsey County, Minnesota; JOSEPH P. LA NASA, as Clerk of the District Court of Ramsey County, Minnesota; and WARREN R. SPANNAUS, as Attorney General of the State of Minnesota,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Eighth Circuit

Petitioners pray that this Court issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the judgment of that court in Cause No. 73-1378.

OPINIONS BELOW

The opinion of the United States District Court, Judge William G. Juergens of the Eastern District of Illinois, assigned to hear this case in the District of Minnesota (because Judge Edward J. Devitt of the District of Minnesota where this action was brought is one of the defendants) is not reported but appears in the Appendix hereto, separately printed, page A1.

The opinion of the United States Court of Appeals for the Eighth Circuit (Judges Gibson, Stephenson and Webster, with opinion by Judge Stephenson) is reported in 500 F.2d 138 and reproduced in the Appendix hereto, page A76.

JURISDICTION

The judgment sought to be reviewed (A87) is dated, and was entered, July 8, 1974; petition for rehearing (A89) was denied August 13, 1974. (A95.)

This Court has jurisdiction to review under 28 U.S.C. 1254.

QUESTIONS PRESENTED

The questions presented are:

1. Whether it is a denial of due process (1) for a federal court to *abstain jurisdiction and dismiss* the action (brought by a widow (a) to be restored to her right to renounce her husband's will, which she waived in reliance upon a contract of settlement, or, in the alternative (b) to recover damages for the fraudulent breach of that contract) on the ground that proceedings in state court "may" resolve the renunciation issue, and (2) for the court to fail to adjudicate the breach of contract claim (which is not involved in the state court proceedings) thereby exposing any subsequent suit, because of its later filing, to statute of limitations and other defenses that would not be available if the breach of contract suit were permitted to proceed to trial or were ordered held on the District Court's docket to await the result of the proceedings in state court on the renunciation issue.

2. Whether the abstention doctrine, never heretofore so applied (except in *United States v. Michigan National Corporation*, No. 73-1737, which this Court has just reversed), permits a federal court to abstain jurisdiction (in this case, of a breach of contract claim) on the ground that proceedings in state court "may" resolve the renunciation issue, where the breach of contract claim (not involved in the state proceedings):

   (a) does not turn on any constitutional question decision of which might be obviated by the result of the state court suit;

(b) does not involve any conflict with the probate or other laws of the state or with any prior judgment or proceeding;

(c) does not turn on any unsettled question of state law.

3. Whether it is a wrongful extension of the abstention doctrine, if otherwise applicable, for a federal court to dismiss the complaint, or, whether the doctrine requires a federal court, if it does not order trial of the breach of contract claim, to order the proceedings stayed, instead of dismissed, as in *United States v. Michigan National Corporation*, No. 73-1737, decided October 21, 1974.

APPLICABLE CONSTITUTIONAL PROVISION

The Fifth Amendment to the Constitution provides:

"No person shall be * * * deprived of * * * property, without due process of law * * *."

STATEMENT OF CASE

Following the death of the husband, controversy developed between the widow on the one hand, and, on the other, the Executors of her husband's estate and the majority Directors of The Bush Foundation, a charitable foundation established by the couple 13 years before the husband's death. Both had made substantial contributions to the Foundation.

The Foundation, named the residuary legatee in the will, was to receive the bulk of the husband's estate.

—The Controversy

The widow, who was a Director of the Foundation and its chairman, believed the majority Directors of the Foundation and the two Executors, both of whom were Directors of the Foundation:

1. Were not carrying out her husband's wishes with respect to the Foundation,
2. Were, for purposes of their own, unduly delaying distribution to the Foundation, and
3. Were willfully holding up the closing of the estate.

Additionally, even though the will, in giving the family's Florida estate to the Foundation, provided that:

> "So long as she wishes to occupy the premises my dear wife, EDYTH BUSH, is to have the right to do so *free of charge*,"[1]

the Executors insisted that the widow (1) despite the "free of charge" provision, must pay for the upkeep, taxes, insurance, maintenance, and all other expenses of the property, and (2) despite the "So long as she wishes" provision, would lose her life interest in the house if she should move out because she then would not "occupy" it.

So distressed was the widow by the conduct of the Executors and the majority Directors of the Foundation that, within the time permitted by law, she executed a renunciation of her husband's will, and elected to take as her widow's portion one-half of the estate as provided by Minnesota law.

—The Settlement

When the Executors and the majority Directors learned that the widow had executed a renunciation of

[1] Emphasis supplied throughout.

the will, they immediately proposed a compromise whereby, if the widow would withhold filing the renunciation:

1. The Executors would pay the widow $2,100,000 in settlement of the "free of charge" issue, and

2. The majority Directors would amend the Foundation articles and by-laws to provide for a bicameral Board of Directors, the widow and two Directors favorable to her views to constitute Class B Directors with three votes, and the others to constitute Class A Directors with four votes, *the affirmative vote of each house to be required* for action by the Foundation. This gave the widow a veto (with her two colleagues) over actions of the Foundation she believed her husband would not have approved.

The widow agreed and thus gave up her claim to half of her husband's estate in exchange for the veto.

The settlement contract, as required by its terms, was approved by the probate court in Minnesota and by the probate court in Florida where ancillary administration was underway, and the Foundation's articles and by-laws were amended as provided in the agreement and filed with the Minnesota Secretary of State.

—The Subsequent Events

Following the settlement, the Executors gave evidence that they intended to get on with the closing of the estate and to distribute promptly the "residue" to the Foundation. The Executors petitioned for, and from the Minnesota probate court obtained, an order adjudging the Foundation to be the residuary legatee and directing the Executors to make a preliminary distribution of $2,500,000 to the Foundation. That sum constituted income which had accumulated in the Executors' hands.

But two weeks later the Executors—*the statutory period for filing the renunciation having then passed*—did a complete about face.

The Executors pursued the Minnesota probate judge to the ski slopes in Vail, Colorado, and *without notice to the widow, her colleagues, or her counsel,* there obtained from him an *ex parte* order vacating the adjudication that the Foundation *is* the "residuary legatee" authorized "and able to take under the will," and revoking the order to distribute to the Foundation.

A series of events followed that confirmed the widow's belief that, as averred in the complaint, the Executors and Class A Directors "did not in fact intend to perform" the settlement agreement, *viz:*

1. The Class A Directors refused to appeal the Colorado order that revoked the adjudication that the Foundation *is* the "residuary legatee" and revoked the order to make distribution to the Foundation.

2. The Executors and Class A Directors activated the A. G. Bush Institute, a paper corporation established by the husband a year before his death. It had never had a meeting, had no assets, no by-laws, no officers. It was named in the will as an *alternate* to receive the residue if The Bush Foundation "be unable to take * * *." The belated resurrection of the Institute signalled the determination of the Executors and Class A Directors to substitute the Institute as the residuary legatee in place of the Foundation.

3. The Class A Directors (who at that time were March, Post, Judge Devitt and Executor Arrowood) petitioned the Minnesota probate court to vacate the order approving the settlement. (The petition ultimately was dismissed by the probate court and the adjudication approving the settlement therefore still stands.)

The widow (with the two Class B Directors favorable to her, Lee and Bassler) thereupon brought suit in state court in Minnesota, *not to assert any personal right*, but in their representative capacities, she as Chairman of the Foundation and a Class B Director, and Lee and Bassler as Class B Directors:

To adjudge that The Bush Foundation *is* the residuary legatee,

To enjoin acts of defendants designed to defeat distribution to The Bush Foundation,

To remove the Class A Directors for their breaches of duty, and

To remove the Executors of the husband's estate for their breaches of duty.

No *personal* claim of the widow was asserted in that or any other proceeding. Every action the widow took sought to compel the Executors and Class A Directors to carry out their obligation to make distribution to the Foundation and to close the estate.

The state court suit, after three days of trial, ended in a stipulation and judgment of settlement which did away with the bicameral board and replaced it with a unicameral board of 16 members, including the widow.

Thus, by eliminating the bicameral board, the widow was stripped of that for which she had bargained: a veto, with the Class B Directors, of acts by the Foundation she deemed unwise. For her veto was substituted one vote in 16.

—The Decision Below

The District Court mistakenly held the stipulated judgment in the state court suit res judicata of the widow's present suit, and, without hearing any evidence, by summary judgment "dismissed the complaint on the merits

citing the alternative bases of res judicata, collateral estoppel and abstention." 500 F.2d at 139; Appendix, p. A77.

The Court of Appeals affirmed, but "solely upon the basis of abstention," and remanded

> "to the district court for the single purpose of modifying the judgment to reflect abstention as the basis for dismissal rather than a decision on the merits." 500 F.2d at 143; Appendix, p. A86.

The state court judgment, as a matter of law, could not operate as res judicata because:

1. A judgment in an action brought in a representative capacity, as was the state court suit, cannot bind *the personal rights* of the representative;
2. The widow *did not consent* to the stipulation or judgment which was signed by counsel who did not purport to bind the widow's personal rights, and could not, because under Minnesota law counsel is without authority to settle his client's case, or, for that matter, even to enter the client's appearance;
3. The widow, prior to the time the state court judgment was entered *was disabled, and had been for more than a year*, by a massive stroke from which she never recovered, for which the Florida court was to adjudge her incompetent and appoint guardians for her.

The present suit was brought by the widow's Guardians at the direction of the Florida court, and, upon her death shortly before the judgment in the present case was entered, her Executors, the Petitioners here, were substituted as plaintiffs.

—The Pending Renunciation Suit

Following the widow's death her Executors filed with the probate court in Minnesota the renunciation the widow had executed (but had refrained from filing in reliance upon the settlement contract) and, in addition, in her behalf as her Executors renounced the will.

The renunciation was rejected and that issue is now pending before the Supreme Court of Minnesota.

The claim for breach of the contract of settlement here pressed on behalf of the widow is in no way involved in that case, and, could not be because the probate court under Minnesota laws has jurisdiction only to determine whether there has been a valid renunciation but has no jurisdiction of a claim for damages for breach of any contract with respect to renunciation. (Because of that jurisdictional problem it was necessary to bring a separate suit on the breach of contract claim—hence the two suits.)

The renunciation case was argued in the Supreme Court of Minnesota on September 23, 1974, and is awaiting decision.

JURISDICTION OF DISTRICT COURT

The United States District Court had diversity jurisdiction of this case pursuant to 28 U.S.C. 1332. (A84.) *Markham v. Allen* (1946), 326 U.S. 490, 494.

REASONS FOR GRANT OF WRIT

The writ should issue because:

1. The decision below is in outright conflict with this Court's decision in *United States v. Michigan National Corporation*, U.S. , No. 73-1737, decided October 21, 1974, subsequent to the July 8, 1974, decision of the Court of Appeals in this case.

2. Due process is denied by the court's failure to adjudicate the breach of contract claim and, by the dismissal of the suit. To be sure, a new suit could be filed for breach of the settlement contract (because the dismissal was not on the merits) but that suit would be exposed to claims of defenses that would not be available if the court had remanded that issue for trial or had ordered it held pending decision by the state court on the renunciation issue. If, as the Court of Appeals held, the renunciation issue should be left to the state courts, the widow clearly was entitled to maintain her alternative federal court claim as averred in the complaint, to recover:

> "all damages which have been sustained by her by reason of the breaches of said agreement of settlement of August 27, 1966, and the failure of the various defendants to carry out and perform all of the terms thereof, and by reason of all of the facts herein pleaded. Said damages exceed $100 million." Complaint, paragraph 7.

3. The abstention doctrine is stretched to new and unwarranted lengths by dismissal of the breach of contract claim. The Court of Appeals mistakenly believed abstention justified by *Burford v. Sun Oil Co.* (1943), 319 U.S. 315, and *Alabama Public Service Commission v. Southern Railway Co.* (1951), 341 U.S. 341, 349. Both are inap-

plicable; neither justifies abstention on the breach of contract claim as will be apparent when it is noticed that:

> *Burford*, 319 U.S. 315, held the federal court properly abstained from reviewing a Texas Railroad Commission order regulating the drilling of oil wells since the Texas statute (p. 326), "To prevent the confusion of multiple review of the same general issues" funneled all actions to review such orders (p. 325) "to a state district court" in a single county, and because the Texas courts alone (p. 325) "have the power to give definite answers to the questions of state law posed in these proceedings."
>
> *Alabama*, 341 U.S. 341, following *Burford*, held the federal court should have abstained from enjoining an order of the Alabama Public Service Commission which had rejected the railroad's petition to discontinue two intrastate trains. There, as in *Burford*, the state statutes funneled all appeals from the Commission to a single court by providing for appeal (p. 348) "to the circuit court of Montgomery County as a matter of right."

The considerations that moved *Burford* and *Alabama* manifestly do not apply to a simple common law claim for breach of contract—a claim within the easy competence of a federal court. In adjudicating the breach of contract claim the federal court would face: no constitutional question decision of which might be obviated by resort first to the state courts; no conflict with state law, proceedings or judgments; and no unsettled questions of state law.

Abstention here has been carried to new lengths. Heretofore abstention has been deemed "an *extraordinary* and *narrow* exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co.* (1959), 360 U.S. 185, 188.

Were a constitutional question to intrude, decision of which might be obviated by obtaining a decision in the state court, *Railroad Commission of Texas v. Pullman Company* (1941), 312 U.S. 496, 500-501, or conflict to arise with state law procedures or judgments, *Burford v. Sun Oil Co.* (1943), 319 U.S. 315, 326, or unsettled questions of state law to be faced, *Louisiana Power & Light Co. v. City of Thibodaux* (1959), 360 U.S. 25, abstention would be supportable. But not in a simple breach of contract suit, as here, where none of these conditions exists. Especially is this so since the widow *could not raise her breach of contract claim in the renunciation suit* now on appeal before the Supreme Court of Minnesota. "Since the probate court *did not have jurisdiction to determine the issue of fraud* between these parties" neither does the Supreme Court of Minnesota because "our jurisdiction is only appellate * * *." *Bulau v. Bulau* (1940), 208 Minn. 529, 294 N.W. 845, 846, 848. The Court of Appeals erroneously disregarded the critical point that the breach of contract claim could not be adjudicated in the state court proceeding. *Brillhart v. Excess Insurance Company of America* (1942), 316 U.S. 491, 495.

4. Stay only, not dismissal, would be permissible if abstention otherwise were appropriate. *Kaiser Steel Corp. v. W. S. Ranch Co.* (1968), 391 U.S. 593.

Although the Court of Appeals ordered that the dismissal be not "on the merits," 500 F.2d at 143, Appendix, p. A86, its necessary effect, in addition to loss of time and added expense, is to prejudice a new suit on the breach of contract claim by inviting defenses such as the statute of limitations not available under the present complaint.

Here, as in *United States v. Michigan National Corporation,* U.S. , No. 73-1737, decided October 21, 1974,

one cannot "with assurance" say that the widow's breach of contract claim "will not be prejudiced by a dismissal." Accordingly, since "there is a procedure that preserves beyond doubt" the rights of all parties "and at the same time produces no hardship," the Court should, as in *Michigan National*, order the suit stayed, and not dismissed. By that course, as this Court held, "judicial resources are conserved and both parties fully protected."

CONCLUSION

The manner in which the widow has been done out of her widow's claim on her husband's estate needs ventilation; the manner in which the judgment below puts the abstention doctrine in disarray, and provides a way for a federal court to pass the buck, deserves the alarm and attention of this Court.

Respectfully submitted,

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APPENDIX TO PETITION FOR CERTIORARI

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OPINION OF THE DISTRICT COURT

(Filed March 16, 1973)

NO. 3-72 CIVIL 98

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DISTRICT

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of Edyth Bush, a/k/a Edyth D. Bush, a/k/a Mrs. A. G. Bush, deceased,

Plaintiffs,

vs.

HERSCHEL S. ARROWOOD, individually and as a Co-Executor under the Last Will and Testament of Archibald G. Bush, deceased, and as a former director of The Bush Foundation; MARY JANE DICKMAN, individually and as a Co-Executor under the Last Will and Testament of Archibald G. Bush, deceased; CECIL C. MARCH, individually and as a director of The Bush Foundation; ELMER L. ANDERSEN, individually and as a director of The Bush Foundation; Honorable EDWARD J. DEVITT, individually and as a director of The Bush Foundation; RICHARD L. POST, individually and as a former director of The Bush Foundation; REUEL D. HARMON, individually and as a director of The Bush Foundation; THE BUSH FOUNDATION, a Minnesota Non-Profit Corporation,

Defendants,

and

THOMAS MALONE, as Clerk of the Probate Court, Ramsey County, Minnesota; JOSEPH P. LA NASA, as Clerk

of the District Court of Ramsey County, Minnesota; and WARREN R. SPANNAUS, as Attorney General of the State of Minnesota,

Nominal Defendants.

MEMORANDUM AND ORDER

Juergens, Senior Judge

Plaintiff Edyth D. Bush (also known as Mrs. Archibald G. Bush), hereinafter Mrs. Bush, brought this action by her co-guardians, David R. Roberts and The Commercial Bank at Winter Park, Florida, duly appointed and acting Co-Guardians of the Property of Mrs. Bush, who was adjudged incompetent in the County Court of Orange County, Florida. Mrs. Bush died November 20, 1972, while this action was pending. Executors of her estate, namely, Clarence J. Bassler, Jr., The Commercial Bank at Winter Park, Florida, and H. Clifford Lee, move for substitution and ask that the executors be substituted as plaintiffs in this action.

Rule 25, Federal Rules of Civil Procedure, Title 28, U.S.C.A., provides in pertinent parts as follows:

> Rule 25. Substitution of Parties.
>
> (a) Death.
>
> (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. * * *.

Rule 25.01(1) of the Minnesota Rules of Civil Procedure provides:

> (1) If a party dies and the claim is not extinguished or barred, the court may order substitution of the proper parties.

Some of the defendants argue that the claim presented here is extinguished by the death of Mrs. Bush. While this may be true insofar as a part of the relief prayed is concerned, there yet remain matters in dispute in the litigation which are not necessarily extinguished or barred by death; and this being so, it is necessary to consider the propriety of substitution of parties.

In the absence of substitution of parties there would be no plaintiff, since the authority of the guardians expired at the time of Mrs. Bush's death. Therefore, to further proceed, the motion for substitution of Clarence J. Bassler, Jr., The Commercial Bank of Winter Park and H. Clifford Lee is granted and they are hereby substituted as parties plaintiff in the place and stead of Edyth D. Bush (Mrs. Archibald G. Bush), an incompetent, by David R. Roberts and The Commercial Bank of Winter Park, Florida, Co-Guardians of her Property. Both the original plaintiff and the substituted plaintiffs are citizens and residents of the State of Florida. Each of the defendants is a resident of the State of Minnesota. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs. Jurisdiction is bottomed on diversity.

The executors by commission and omission have adopted the proceedings of their predecessors, the Co-guardians of the Property of Mrs. Bush, incompetent.

The Complaint

Generally stated, the complaint alleges that on January 16, 1966, Archibald G. Bush died in Winter Park, Florida, leaving Mrs. Bush as his widow, him surviving. Prior to this time and under date of April 21, 1965, the decedent made and executed his Last Will and Testament, which after certain bequests left the residue of his estate to The Bush Foundation. The Bush Foundation is a non-

profit corporation founded by Mr. and Mrs. Bush in 1953. Both contributed to The Foundation. Mrs. Bush executed in writing a purported Consent to the Last Will and Testament. It is alleged that there was a trust and fiduciary relationship between Archibald G. Bush and Mrs. Bush as husband and wife; that the husband had an affirmative duty of making to his wife a fair disclosure of the extent and nature of his property, her rights with regard thereto, and the nature and extent of her own property, in order that any consent to his Last Will, made by her, would be an actual one based upon an intelligent knowledge of his and her own property and the effects of the consent. That Archibald G. Bush failed to put his wife in possession of the facts which she should have known in order to intelligently determine the course of her action. That her consent to the Last Will and Testament was not fairly and reasonably obtained and not based upon the sufficient disclosure of facts to permit an informed consent, and upon his death she had the right, as surviving widow, to renounce her consent and to elect to take under the statute.

Following the death of Archibald G. Bush, a petition was duly filed in the Probate Court of Ramsey County, Minnesota, to probate the Last Will and Testament, dated April 21, 1965. That within six months after filing the Certificate of Probate, Mrs. Bush stated her intention to renounce and refuse to accept the provisions of the Will. That on August 27, 1966, and to prevent and avoid her announced intention to renounce the Will, an Agreement of Settlement was entered into between Mrs. Bush, as surviving spouse of Archibald G. Bush, deceased, the defendants Herschel S. Arrowood and Mary Jane Dickman co-executors of the estate of decedent, and the defendant, The Bush Foundation by its then directors, including the

defendants Cecil C. March, Herschel S. Arrowood and Richard L. Post. That in consideration of the terms, conditions and obligations contained in the Agreement of Settlement, Mrs. Bush was induced to and agreed not to renounce and refuse to accept the provisions of the Will. The Agreement of Settlement provided, among other things, that Mrs. Bush was to receive and did receive the sum of $2,100,000. The defendants Arrowood and Dickman, as co-executors of the estate, agreed to continue to retain the services of Messrs. David R. Roberts and Walter N. Trenerry as co-counsel for the co-executors and of Messrs. H. C. Lee and Philip Stringer as special counsel to the co-executors for the duration of the probate of decedent's Last Will and Testament, unless sooner discharged for cause. Defendant The Bush Foundation, acting through its directors, including the defendants March, Arrowood and Post, agreed to and did amend the Articles of Incorporation and By-Laws of The Bush Foundation to provide for two classes of Member-Directors and provided that all voting management and other powers of the Directors and of The Bush Foundation should thereafter be exercised exclusively by a majority vote of each of the two classes of Directors on a bicameral basis. The Bush Foundation by and through its directors further agreed to seek and be guided by the wisdom and leadership of Mrs. Bush and to submit to her all requests for grants or gifts, proposed gifts, grants or operations of The Bush Foundation, so as to have the full benefit of her recommendations prior to taking any action by the Board of Directors of The Bush Foundation, all in the same manner in which the advice, consent and determination of these matters had been sought of Mr. Bush and followed prior to his death, so that The Bush Foundation would be operated in the manner and for the purposes intended by Mr. and Mrs. Bush. That on the 27th day of August,

1966, and at the time of entering into the Agreement of Settlement, defendants Arrowood and Dickman, as co-executors of the estate, and the defendant The Bush Foundation, by and through its directors, represented to Mrs. Bush that they intended to and would perform and fulfill all of the terms and conditions of the agreement. That the representations were made for the purpose of inducing Mrs. Bush to enter into the agreement of settlement and thereby to waive her right to renounce the will. The defendants Arrowood, Dickman, The Bush Foundation, March, and Post (hereafter the defendants named in paragraph 4) intended that Mrs. Bush rely upon the representations and that she did rely thereon. That the defendants named in paragraph 4 did not intend to perform and fulfill all of the terms and conditions. That it was the purpose and intent of the defendants named in paragraph 4 to obtain control of the assets which would come to The Bush Foundation from the estate and to use such assets for the benefit of persons other than The Bush Foundation and in a manner and for purposes other than and contrary to the purpose and intent of the founders of The Bush Foundation. That shortly after entering into the Agreement of Settlement of August 27, 1966, the defendants Arrowood and Dickman, as co-executors of the estate, The Bush Foundation, acting through its Board of Directors and including March, Andersen, Arrowood, Post, Devitt and Harmon, began and have since continued substantial and material breaches of the agreement which are as follows:

(a) Under date of December 29, 1966, defendants Herschel S. Arrowood and Mary Jane Dickman, as Co-Executors, apparently with the knowledge and participation of defendants Cecil C. March and Richard L. Post, obtained an Order from the Judge of the

Probate Court of Ramsey County, Minnesota, referring to The Bush Foundation as a "contingent" residuary legatee. This was for the purpose of attempting to divert the legacy intended for The Bush Foundation to another non-profit corporation in which Mrs. Bush had only a minimal interest and which would permit the use of said funds without seeking the counsel, advice and determination of Mrs. Bush. The defendant The Bush Foundation and by its then designated Class A Directors defendants Herschel S. Arrowood, Cecil C. March, Richard L. Post and Edward J. Devitt refused to appeal said Order of December 29, 1966, as requested by Mrs. Bush and refused to meet with her to discuss the matter.

(b) Under date of February 27, 1967, defendants Herschel S. Arrowood and Mary Jane Dickman, as Co-Executors of the Estate of Archibald G. Bush, advised David R. Roberts and Walter N. Trenerry that their services would no longer be retained as co-counsel and advised H. C. Lee that he was no longer special counsel to said Co-Executors. The change of attorneys was not only in breach of the agreement of settlement referred to above but was contrary to Minnesota Statutes, Section 481.11, in that the said David R. Roberts, Walter N. Trenerry, H. C. Lee and Mrs. Bush did not consent thereto and there was no application for cause to the Probate Court of Ramsey County, Minnesota, for an order therefor.

(c) Under date of December 26, 1967, the defendants Herschel S. Arrowood, Edward J. Devitt, Cecil C. March and Richard L. Post, acting individually and as directors of defendant The Bush Foundation, and defendant The Bush Foundation acting by and

through said directors, petitioned the Probate Court of Ramsey County, Minnesota, to set aside and vacate the agreement of settlement of August 27, 1966, referred to above and to declare the same to be null and void. This constituted an act of violation and repudiation of said agreement of settlement and that thereafter the defendants Elmer L. Andersen and Reuel D. Harmon adopted and ratified the same. Except as to defendant Herschel S. Arrowood, the said Petition to Vacate has never been heard, withdrawn, disclaimed or dismissed.

(d) In an action in the District Court of Ramsey County, Minnesota, entitled Edyth Bush, as a member, a director and chairman of the board of directors of The Bush Foundation et al, Plaintiffs, vs. Herschel S. Arrowood, individually and as a co-executor under the last will and testament of Archibald G. Bush, deceased, and as a member, a director and treasurer of The Bush Foundation, et al, Defendants, being File No. 256691, the defendants Herschel S. Arrowood, Cecil C. March, Richard L. Post and Edward J. Devitt, individually and as members and directors of The Bush Foundation, interposed an Answer and Counterclaim in which, inter alia, it was alleged that the August 27, 1966 agreement of settlement was invalid and void and sought to have the same declared to be void and further sought to set aside the bicameral structure of the Board of Directors of The Bush Foundation which the said defendants and the defendant The Bush Foundation had previously agreed to and adopted in writing as a part of a unitary settlement to induce and persuade Mrs. Bush, as the surviving spouse of Archibald G. Bush, to give up her right to renounce his Last Will and Testament.

(e) Without the knowledge, consent or approval of Mrs. Bush, attorneys of record acting for and on her behalf in said District Court action just above referred to entered into a certain Stipulation of Settlement which, inter alia, eliminated the bicameral structure of the Board of Directors of The Bush Foundation and thereafter on the 10th day of April, 1970, the Honorable Otis H. Godfrey, Jr., one of the Judges of the District Court of Ramsey County, Minnesota, entered an Order pursuant thereto, and a Judgment and Decree was entered thereon on said 10th day of April, 1970.

That by reason of the failure of the consideration to be received by Mrs. Bush, which consideration induced her and persuaded her as the surviving spouse of Archibald G. Bush to give up her right to renounce his will, the plaintiff, by her co-guardians, is entitled to rescind the agreement of settlement of August 27, 1966, and to renounce and refuse to accept the provisions of the will of her deceased husband and that she is entitled to the one-half statutory share of the assets of the estate, subject only to the debts of the decedent and the charges and expenses of administration.

That in the event it should be determined for any reason that plaintiff is not entitled to rescind the agreement, plaintiff is entitled to recover all damages which have been sustained by her by reason of the breaches of the agreement and the failure of the various defendants to carry out and perform the terms thereof, which damages exceed $100 million. That the present operations of The Bush Foundation are directly contrary to the known purposes and intent of its founders. The known purposes and intent, while the same are either known to, or could be ascertained from the records by the members

of the Board of Directors of The Foundation and specifically those who are named defendants, were best known to Mrs. Bush and to others who had been closely associated with Archibald G. Bush during his lifetime. That it should be and is the responsibility of The Bush Foundation and its Board of Directors to carry out and fulfill the known purposes and intent of its founders. That the known purposes and intent can only be carried out and fulfilled if the bicameral principle which was adopted pursuant to the settlement agreement is restored. That the same would be legal in all respects and would permit The Bush Foundation to carry out and fulfill the purposes for which it was founded. That in the interest of justice and for the purposes herein alleged, the stipulation and judgment decree entered thereon in the Ramsey County District Court referred to hereinabove, being File No. 356691, should be vacated and declared void, and more particularly of no effect on or binding as to any purported release, waiver or disclaimer of the property rights or marital rights of Mrs. Bush, and that the defendant The Bush Foundation and the various members of the Board of Diectors named as defendants should be required to amend the Articles of Incorporation and the By-Laws of The Bush Foundation so as to restore the bicameral principle referred to as the same had been agreed upon on August 27, 1966.

That on October 12, 1971, Mrs. Bush, by the co-guardians of her property, filed in the Probate Court of Ramsey County, Minnesota (based upon the failure of consideration, to be received by her, for giving up her right to renounce), the Renunciation previously executed by her on August 5, 1966, and the co-guardians of the property of Mrs. Bush filed a further renunciation on her behalf. That on November 23, 1971, the defendants Arrowood and

Dickman filed an instrument entitled "Executors' Petition Re Final Account of October 15, 1971," wherein they alleged that "There has heretofore been filed by or on behalf of decedent's widow, Edyth Bush, instruments purporting to renounce decedent's Will heretofore admitted to probate" and asked the Court to "determine that the purported renunciation of the Will is of no force or effect." That plaintiff, through the co-guardians of her property, filed written objections to the proposed decree adjudging renunciation of no force or effect and specifically requested that the matter be set down for trial on the merits after completion of discovery. That the matter came on before the Honorable Andrew A. Glenn, Probate Judge, Ramsey County, Minnesota, on February 24, 1972, pursuant to an order of that Court "for the purpose of determining what issues exist for determination by the Court and for the purpose of scheduling hearings or trials thereon." Counsel for plaintiff herein advised the Court that a number of depositions would be required and suggested that this be considered by the Court in ultimate scheduling of the hearing on the proposed renunciation. Counsel for defendants Arrowood and Dickman, as co-executors, and counsel for The Bush Foundation requested early hearing. That the Court thereupon summarily announced that it was of the considered view that there was no valid renunciation and that the purported renunciations were of no legal force and effect that no hearing thereon would be had and requested counsel for the co-executors to prepare an interlocutory decree to that effect. The Interlocutory Decree was prepared and signed by the Judge on March 1, 1972. Thereafter a copy was served on attorneys for plaintiff. That it would be necessary for plaintiff to take an appeal therefrom to the District Court of Ramsey County, Minnesota.

That to avoid multiplicity of actions and in the interest of justice, all matters relating to the rights of renunciation by and on behalf of Mrs. Bush should be heard and determined in a single forum and in this action.

Plaintiff prays judgment and decree of this Court as follows:

1. That the Consent of Edyth D. Bush to the Last Will and Testament of Archibald G. Bush under date of April 21, 1965, was not fairly and reasonably obtained and is null and void and without force or effect.

2. Rescinding the Agreement of Settlement entered into on or about August 27, 1966, between Edyth D. Bush, as surviving spouse of Archibald G. Bush, the defendants Herschel S. Arrowood and Mary Jane Dickman, as Co-Executors of the Estate of Archibald G. Bush, and the defendant The Bush Foundation, and determining that the plaintiff is entitled to renounce the Last Will and Testament of Archibald G. Bush.

3. Vacating and declaring void the Stipulation dated September 17, 1969, and the Judgment and Decree entered thereon on the 10th day of April, 1970, in the District Court of Ramsey County, Minnesota, in that certain action entitled Edyth Bush, etc., et al, Plaintiffs, vs. Herschel S. Arrowood, etc., et al, being File No. 356691, and requiring the defendant The Bush Foundation and the members of its Board of Directors named as defendants herein to amend its Articles of Incorporation and its By-Laws so as to restore the bicameral principle of its Board of Directors.

4. Vacating and setting aside the Interlocutory Decree Relative to Purported Renunciation of Will entered in the Probate Court of Ramsey County, Minnesota, on the

1st day of March, 1972, and requiring said Court to enter its Decree in accordance with the determination of this Court in the premises.

5. For an award of damages against such defendants, jointly and severally, in the sum of one hundred million dollars ($100,000,000.00), or such other amount as the Court and jury may determine.

6. For such other and further relief as the Court may determine, including reasonable attorneys' fees and the plaintiff's costs and disbursements herein.

Other Pleadings

The various defendants have filed answers to the complaint in which they raise numerous defenses. During the course of a preliminary hearing, the Court suggested that the matters raised by defenses in the answer might more properly be submitted under the Federal Rules in the form of motions. The defendants have now submitted motions directed to the complaint and to other matters which will be hereinafter considered. The Court does not at this juncture delve into the matters raised by the various answers of the defendants.

Pertinent Will Provisions

8

I devise and bequeath all the rest, residue, and remainder of all my property of whatever kind and description, and wherever it may be, to THE BUSH FOUNDATION of St. Paul, Minnesota, but if it be unable to take or if bequests to it be not deductible for Federal estate tax purposes, then I devise and bequeath all of said rest, residue and remainder to the A. G. BUSH INSTITUTE of St. Paul, Minnesota. If neither

The Bush Foundation nor the A. G. Bush Institute is able to take or if bequests to them be not deductible for Federal estate tax purposes, then I devise and bequeath all of said rest, residue and remainder to or for the use of a non-profit corporation to be organized by my Executors and operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and legacies or devises to which are deductible for Federal estate tax purposes under Section 2055 of the Internal Revenue Code of 1954 as the same may be in force or amended as of the date of my death.

9.

My representatives are directed to pay from the residue of my estate all taxes (income, inheritance, estate, or from my legatee by virtue of his legacy, and including taxes related to property passing by my death but not forming part of my estate for probate purposes.

10

I have given nothing to my beloved wife, EDYTH BUSH, because we have often discussed our testamentary plans and have agreed that the form set out in this instrument is the most suitable.

August 27, 1966 Agreement

In the Matter of the Estate of Archibald G. Bush, a.k.a. A. G. Bush

AGREEMENT OF COMPROMISE AND SETTLEMENT

Edyth Bush, surviving spouse of the above named decedent (herein referred to as Mrs. Bush), having stated her intention to renounce and refuse to accept the provisions of the Last Will and Testament of the above named decedent, under the provisions of Minnesota Statutes, § 525.212, and of Florida Statutes, §§ 731.34 and 731.35, alleging that notwithstanding her written consent thereto, she was not informed of the contents of the said Will, of the extent, nature or character of her husband's estate, of the provisions made for her in the said Will, nor of her statutory rights as the surviving spouse of her said husband, and having made claims against Herschel S. Arrowood and Mary Jane Dickman, co-executors under the Last Will and Testament of the above named decedent, (hereinafter referred to as Executors), and others, the parties, in order to amicably resolve their differences and to resolve ambiguities in the Last Will and Testament of the above named decedent, do hereby in consideration of the mutual covenants herein contained and intending to be legally bound hereby agree as follows, subject to the approval of the above Court and of the County Court of Orange County, Florida:

(1) Executors shall:

(a) promptly upon approval of this Agreement by the above Court and of the County Court of Orange County, Florida, or the entry of Partial Decree of Distribution, if required, pay to Mrs. Bush

the sum of Two Million, One Hundred Thousand Dollars ($2,100,000.00) as consideration for the agreements of Mrs. Bush contained in paragraph 2 hereof;

(b) on or prior to November 1, 1966, sell to Mrs. Bush all outstanding stock of Bush Management Company, a Minnesota corporation, for the sum of Two Hundred Fifty Thousand Dollars ($250,000.00), in cash. At the time of the said sale, the corporate assets shall consist principally of cash in bank of approximately Two Hundred Thousand Dollars ($200,000.00), accounts receivable from Mrs. Bush and such office furniture, equipment, furnishings and supplies as may be purchased by Bush Management Company from Executors;

(c) pursuant to Article 9 of the Last Will and Testament of the above named decedent, pay all estate and inheritance taxes which may now or hereafter come due by reason of the death of the above named decedent or arising hereunder, all without cost or expense to Mrs. Bush;

(d) continue to retain the services of Messrs. David R. Roberts and Walter N. Trenerry as co-counsel for Executors, and of Messrs. H. C. Lee and Philip Stringer as special counsel to the Executors, for the duration of the probate of the Last Will and Testament of the above named decedent, unless sooner discharged for cause;

(e) promptly petition the above Court and the County Court of Orange County, Florida, for the approval of this Agreement.

(2) Mrs. Bush agrees:

(a) that she has been fully advised by Bernard E. Epton, her counsel, of (i) the nature and extent

and character of the estate of her late husband, which is likely to exceed the sum of One Hundred Thirty Million Dollars ($130,000,000.00), (ii) the provision made for her in his Last Will and Testament, consisting of a life interest in his home in Winter Park, Orange County, Florida, and (iii) her right to renounce and refuse to accept provisions of the said Will under the provisions of Minnesota Statute, § 525.212, and of Florida Statutes, §§ 731.34 and 731.35, and upon such refusal and renunciation, to become entitled to receive one-half of the said estate, being approximately Sixty-five Million Dollars ($65,000,000.00);

(b) that she does hereby, upon the advice and with the consent of her counsel, (i) waive her right to renounce the Last Will and Testament of her late husband and refuse to accept the provisions of the said Will, (ii) elect to take under the said Will, and (iii) ratify, confirm and approve her Consent dated April 21, 1965, to the Last Will and Testament of her late husband;

(c) to pay to the Executors the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) concurrently with receipt from the said Executors of the shares of stock of Bush Management Company as referred to in paragraph 1(b) hereof;

(d) that Article 4 of the said Will which grants to her the right to occupy the said home in Winter Park, Orange County, Florida, "free of charge" shall be construed to mean that the Executors shall not charge her with any rent for the use and occupancy thereof, but that she shall pay, from her separate funds, all expenses in connection therewith, including, but not limited to, real estate taxes and assess-

ments, insurance premiums, maintenance and repairs, the salaries of employees and servants and all other expenses in connection with her residence therein;

(e) that she will pay, out of her separate funds, for all legal, accounting, management, bookkeeping, financial, investment, stenographic, secretarial, clerical, and other expenses and services of every kind, nature and description incurred by her prior and subsequent to the date hereof, and that the Executors will be under no liability or obligation to furnish her with any of the same.

(f) that she does hereby release, acquit and forever discharge each and all of (i) The Bush Foundation and each and all of its Members, Directors, officers and employees, (ii) Minnesota Mining & Manufacturing Company and each and all of its directors, officers and employees, (iii) Executors, and each of them, and their agents, and (iv) the Estate of her late husband, whether any or all of the foregoing acted in their individual or fiduciary capacities, from any and all claims, demands and actions which she may now have or hereafter have against them, or any of them, arising out of any matter or thing whatsoever prior to the date hereof, whether known or unknown, fixed or contingent, whether arising from tort or contract, whether or not arising from the marital status between her and her said husband, whether or not arising under or pursuant to the Last Will and Testament of her said husband, and whether or not arising under the Statutes of the State of Minnesota, of the State of Florida, or otherwise, it being the intention of Mrs. Bush to make this release as broad and as general as the law permits;

(g) that she has no rights, claims, interest or benefit under the Last Will and Testament of her late husband, under the Statutes of the State of Minnesota, the State of Florida, or otherwise, as an heir, legatee, devisee, beneficiary, surviving spouse or creditor of her late husband, except only as otherwise provided in his said Last Will and Testament and under this Agreement, and does hereby waive, release and surrender any right, claim, interest or benefit she may now or in the future have as such heir, legatee, devisee, beneficiary, surviving spouse, creditor, or otherwise, whether for dower, curtsey, spouse's allowance, statutory selection, statutory share in the said estate, share by intestate succession, beneficial interest under the Last Will and Testament of her late husband, beneficial interest under any trust created thereunder, or otherwise, except only as otherwise provided in the Last Will and Testament of her late husband, in this Agreement or under the existing court order allowing widow's maintenance;

(h) that she does hereby release, surrender and waive any right or claim she has or may have to contest or appeal from the final account, any intermediate account, the Final Decree of Distribution, or any Partial Decree of Distribution, in the above entitled matter, and any right or claim to contest or surcharge the account of Executors, whether in their fiduciary or individual capacities, for any reason or claim arising out of any matter or thing whatsoever, except only the failure of Executors to perform this Agreement;

(i) that this Agreement is in full and complete settlement and compromise by her of all disputes now and heretofore existing between her and Exe-

cutors, of all her property and support rights as an heir, legatee, devisee, beneficiary, surviving spouse and creditor of the above named decedent, except only as otherwise provided in the said Will, or under the existing court order for widow's maintenance, in this Agreement of her right to file and prosecute any action or proceeding contesting the validity of her Consent to the Last Will and Testament of her late husband, of her right to renounce the Last Will and Testament of her late husband and of her right to elect to take her statutory share of the estate of her late husband as a surviving spouse.

(j) That this agreement is fair, reasonable and equitable.

(3) Each of the parties acknowledges that they have been represented by counsel of their own choosing and have been fully and fairly advised of all of their rights in connection with this Agreement.

(4) This Agreement shall be binding upon each of the parties, the heirs, executors, administrators and assigns of Mrs. Bush, and the successors of Executors.

(5) This Agreement was entered into by Executors in their fiduciary and not in their individual capacities, and Mrs. Bush shall look for the performance of this Agreement only to the Estate of the above named decedent and not to the Executors in their individual capacities.

(6) If for any reason this Agreement is not approved by the above Court and by the County Court of Orange County, Florida, the same shall be void and of no force and effect.

Dated this 27th day of August, 1966.

In accordance with the provisions of the Agreement, it was submitted to the Ramsey County Probate Court for approval. That Court approved and confirmed the Agreement by Order dated August 30, 1966. The Agreement was also approved by the County Judges Court for Orange County, Florida, on August 31, 1966.

Ramsey County District Court Action

Mrs. Bush, as a member-director and Chairman of the Board of Directors of The Bush Foundation, et al., as plaintiffs, filed suit in the District Court for Ramsey County, Minnesota, naming as defendants Herschel S. Arrowood, individually and as a co-executor to the Last Will and Testament of Archibald G. Bush, deceased, and as a member, a director and treasurer of The Bush Foundation; Mary Jane Dickman, individually and as co-executor of the Last Will and Testament of Archibald G. Bush, deceased; Cecil C. March, individually and as a member, a director and president of The Bush Foundation; Richard L. Post, individually and as a member, a director and secretary of The Bush Foundation, Honorable Edward J. Devitt, as a member and director of The Bush Foundation; and Honorable Douglas M. Head, as Attorney General of the State of Minnesota.

The complaint in the District Court, generally stated, alleges that the plaintiffs bring the action in their representative capacity and on behalf of The Bush Foundation. The action was brought to enjoin alleged breaches of trust and fiduciary duty by the defendants other than the defendants Devitt and the Attorney General and for instructions to plaintiffs and to defendants in carrying out their duties as trustees of a charitable trust represented by The Foundation, for a declaratory judgment, determining and adjudging the rights and duties of the parties as mem-

bers, directors and officers of The Foundation and their other fiduciary duties.

The complaint alleges that the plaintiff Edyth Bush was domiciled in St. Paul, Minnesota, and is the widow and sole heir-at-law of and is a legatee in the Last Will and Testament of Archibald G. Bush, hereinafter Mr. Bush, who died on January 16, 1966; that the Will of Mr. Bush was duly admitted to probate on March 1, 1966, in the Probate Court of Ramsey County, Minnesota; that letters testamentary were issued on that date to defendants Arrowood and Dickman; that plaintiff Edyth Bush is a member and director and is Chairman of the Board of Directors of The Foundation, a non-profit corporation of St. Paul, Minnesota; that the action is brought in behalf of The Foundation; that Clarence J. Bassler, Jr., is a resident of Northbrook, Illinois, and is a nephew and the closest male relative of plaintiff Edyth Bush and also a member and director of The Foundation and in those capacities joins in the action of the plaintiff in behalf of The Foundation.

That H. Clifford Lee is a resident of Edina, Minnesota, and is an attorney-at-law employed by plaintiff Edyth Bush as an agent and attorney-at-law; that he was employed by Mr. Bush as a personal attorney during Mr. Bush's lifetime; that he is also a member and a director of The Foundation, and in those capacities joins in this action as a party plaintiff on behalf of said Foundation.

That the defendant Herschel S. Arrowood is a resident of Mendota Heights, Minnesota, and is an acting co-executor with defendant Dickman under Mr. Bush's will; he is also a member, director and the treasurer of The Foundation. He was employed by Minnesota Mining and Manufacturing Company, hereafter the 3M Company, as a chief

accountant and by Mr. Bush for several years prior to death as an accountant and a tax consultant.

That the defendant Mary Jane Dickman is a resident of St. Paul, Minnesota, and is an acting co-executor with defendant Arrowood under Mr. Bush's will. She was formerly employed by 3M Company as a private secretary.

That the defendant Cecil C. March is a resident of North Oaks, Minnesota, and is a member, director and president of The Foundation. Until recently he was a director and a vice president of the 3M Company. That Mr. Bush was also a director of the 3M Company, having been one of those instrumental in building it from a small into one of the largest and most successful enterprises. Mr. Bush served as a director of the 3M Company from 1921 until his death and for many years served as an officer and later as chairman of the executive committee of the company. Defendant March was also named in Article XI of Mr. Bush's will as a first successor to succeed either defendant Arrowood or defendant Dickman as executor.

That the defendant Richard L. Post is a resident of North Oaks, Minnesota, and is a lawyer employed in the legal department of the 3M Company and is one of its assistant secretaries. He is a member, a director and secretary of the Foundation, having been elected such in April, 1966, after Mr. Bush's death.

That the defendant Edward Devitt is a resident of St. Paul, Minnesota, and is the Chief Judge of the United States District Court of Minnesota. He has been a member and director of The Foundation since January 13, 1967, having succeeded Walter N. Trenerry, who resigned the office on that date. It is alleged that plaintiffs have no knowledge and no reason to believe that defendant

Devitt participated affirmatively as a member or director of The Foundation in the matters hereinafter alleged. He is made a party defendant in order that the court may have jurisdiction over all members, directors and officers of The Foundation.

That the defendant Douglas M. Head is the Attorney General of the State of Minnesota and under the laws of the State of Minnesota he may be charged with the responsibility incident to certain matters alleged in the complaint and is therefore made a party to the action.

The Foundation is a non-profit corporation organized under the laws of Minnesota and has functioned continuously and exclusively since its creation in 1953 for the purposes stated in Article 2 of its original and amended Articles of Incorporation as follows:

> The Foundation will confine itself solely and exclusively to carrying on and promoting purely charitable, scientific, literary and educational works and activities, as defined in the law of Minnesota and of the United States.

Except for administrative expenses and a modest cash balance on hand, all income of The Foundation since its creation has been donated, expended or committed exclusively for the purposes for which it was organized.

On January 19, 1966, the United States Treasury Department issued its letter of tax exemption to the Foundation, advising that it was exempt from Federal income tax under § 501(c)3 of the Internal Revenue Code because it was organized and operated exclusively for charitable and religious purposes, that contributions to it are deductible by donors in computing their taxable income, that bequests and legacies to it are deductible in computing

the taxable estate of a decedent for Federal estate tax purposes. That this tax exempt status of The Foundation *has remained in full force and effect.*

Apart from the value of the residuary bequest to it under the will of Mr. Bush, The Foundation, as of October 31, 1967, held assets having a market value on that date, according to the treasurer's current statement, of $19,527,588, which consisted almost entirely of cash and readily marketable securities. The largest single asset was 191,792 shares of common stock of the 3M Company with a market value of $17,141,410.

Amendments to the Articles of Incorporation of The Foundation were filed in the office of the Secretary of State of Minnesota and became effective August 31, 1966. Article 7 of the amended Articles provides:

> a) The seven members of the Foundation, who are also its seven directors, are divided into two classes comprised of four Class A directors and three Class B directors.
>
> b) The term of office of each director is three years; vacancies in Class A directorships are filled by the remaining Class A directors, and vacancies in Class B directorships are filled by the remaining Class B directors.
>
> c) The majority vote of the Class A directors and the majority vote of the Class B directors, acting bicamerally, is required for any action by the Board of Directors as a whole.

The present Class A directors are defendants March, Arrowood, Post and Devitt; the present Class B directors are plaintiffs Edyth Bush, Clarence J. Bassler, Jr., and H. Clifford Lee.

Immediately prior to Mr. Bush's death on January 16, 1966, the Foundation's seven members, who were also its seven directors, were: Mr. Bush, Edyth Bush, Cecil C. March, Herschel S. Arrowood, Mary Jane Dickman, Genevieve C. Dressen and Walter N. Trenerry. On April 5, 1966, defendant Dickman and Genevieve C. Dressen resigned as directors and as secretary and assistant treasurer, respectively of the Foundation. Under the Foundation's Articles of Incorporation they thereupon ceased to be members of the Foundation. The vacancies, resulting from Mr. Bush's death and from the resignations, were filled on April 5, 1966, by the election of plaintiffs Bassler and Lee and defendant Post as members and directors. After adoption of the amendments to the Articles of Incorporation, defendants March, Arrowood and Post, and Walter N. Trenerry became Class A directors, and plaintiffs Edyth Bush, Bassler and Lee became Class B directors. All of such directors remained in office, except that on January 13, 1967, Walter N. Trenerry resigned as a Class A director and vice president, and his place was filled by the Class A directors electing defendant Devitt as a member and Class A director.

The residue of the estate of Mr. Bush, amounting to about $150,000,000 at present market value, is bequeathed to the Foundation under Article 8 of his will.

At the time of Mr. Bush's death on January 16, 1966, and at all times subsequent, the Foundation was and is a corporation in good standing in the State of Minnesota and was then and now is actively operating solely for the charitable, scientific, literary and educational purposes for which it was organized, and since January 19, 1955, has been exempt from Federal income tax and bequests to it are deductible for Federal estate tax purposes. The Foundation is the residuary legatee under Mr. Bush's will

and is entitled to receive all of the rest, residue and remainder of his estate.

The Alleged Unlawful Combination
and Breaches of Fiduciary Duties

It was the duty of the defendant directors of the Foundation and the defendant executors to support and carry out the intent of the testator as set forth in Article 8 of the will that the Foundation receive the bequest to it as a residuary legatee and to cause the residue of the estate and the income to be distributed to the Foundation at the earliest possible date. Instead, the defendants, other than Devitt and the Attorney General, have unlawfully combined, in breach of their fiduciary duties, to defeat or delay distribution to the Foundation, contrary to the testator's intent. In furtherance of the combination and in breach of their fiduciary duties, defendants have failed to make distribution of the residue of the estate, although the time for distribution has long since arrived, except for their petition for partial distribution and an order thereon dated December 14, 1966, which they later caused to be vacated. Defendants March, Arrowood, Post and Devitt made no effort to cause the distribution to be made to the Foundation, failed to apply to the Probate Court of Ramsey County, Minnesota, for an order authorizing distribution. That the defendants have acted individually and collectively to delay and prevent distribution from the estate. That all specific bequests and all claims have been paid and all estate inheritance taxes and expenses of administration have been paid or reserved, and that a reserve of $1,000,000 is ample to meet all unpaid items for which cash and short term Government bills are now held by the executors. All other assets in Mr. Bush's estate are now ready and available for distribution to

the Foundation and should be distributed forthwith and delivered to the Foundation. Distribution would be in accord with the direction of MSA 524.47, which provides:

> Every executor * * * shall have one year from the date of his appointment for the settlement of the estate. * * * For cause shown the period herein may be extended by the court, not exceeding one year at a time.

The one-year period has expired and has not been extended by the court.

That since the time for substantial distribution of the residue of Mr. Bush's estate, it has been the duty of the directors and officers of the Foundation to cause it to apply to the Probate Court for prompt distribution to the Foundation. That the defendants March, Arrowood and Post have refused to take any action on behalf of the Foundation to establish its right to take the bequest and to obtain distribution to the Foundation. They have improperly and unlawfully combined with the executors to cast doubt on the Foundation's right to take the bequest and to oppose any distribution of the bequest to the Foundation unless they can be assured of complete control of the management of the Foundation by abolishing the distinction between Class A and Class B directors or otherwise. That the defendants, other than Devitt and the Attorney General, have further combined with themselves and possibly with others to delay distribution in the hope that their further efforts might disqualify it from receiving the bequest and enable the A. G. Bush Institute, controlled by the defendants other than defendants Devitt and the Attorney General, as the first alternate legatee, or a new non-profit corporation organized by the executors pursuant to the second alternative of Article 8 of the will to receive

the residue in place of the Foundation. Such new corporation, if formed by the executors, would be controlled by the defendants and would exclude any participation by the plaintiffs or any member or representative of Mr. Bush's family in its management. The actions of these defendants in support of the combination and in breach of their fiduciary duty are hereafter more fully described.

The Probate Court Order of December 14, 1966 to Distribute 1966 Income to the Foundation and the Orders of December 29, 1966, Vacating that Order.

By petition dated November 21, 1966, the executors petitioned the Probate Court for leave to make partial distribution to the Foundation as the residuary legatee of accrued income of the estate for the year 1966 in the amount of about $2,500,000. In the petition the executors stated that they had been advised by counsel that the Foundation "is able to take and that bequests to it are deductible for Federal estate tax purposes * * *" and prayed that $2,500,000 be distributed and paid over out of the income out of the estate to The Bush Foundation as residuary legatee. That nevertheless, on December 14, 1966, after hearing upon notice to all parties, defendants March, Arrowood and Post employed an attorney to argue before the Probate Court that there should be omitted from the order of partial distribution any finding or statement implying that the foundation was entitled to the residue. That defendants March, Arrowood and Post, as members, directors and officers of the Foundation, owed complete loyalty to the Foundation and had a duty to support the petition of the executors rather than to take action questioning the right of the Foundation to take

as residuary legatee. In spite of the efforts of the attorney, however, the Probate Court entered an order on December 14, 1966, in accordance with the prayer of the petition.

Thereafter, on December 29, 1966, without notice to the Foundation or plaintiffs, but with knowledge and approval of the Class A directors, the executors, through a new attorney not previously associated with the estate, filed a sworn petition in the Probate Court, asking that the order of December 14, 1966, as to distribution to the Foundation of accrued income, be vacated. In the petition the executors asked that the Court delete from its order of December 14, 1966, finding of fact No. 7 which found that the Foundation

> "is authorized and able to take under the will of decedent, and bequests to it are deductible for Federal Estate tax purposes."

and finding of fact No. 8 that

> "it is desirable and in the best interest of the Estate and of the residuary legatee and devisee, The Bush Foundation, that a partial distribution * * * be distributed and paid over * * * to The Bush Foundation of St. Paul, Minnesota, the residuary legatee and devisee, on or before December 31, 1966."

The petition also asked for deletion of the order, directing the executors to distribute $2,500,000 to the Foundation, "as residuary legatee and devisee." In paragraph 5 of said petition the executors further improperly stated that "the intent of the testator herein was that the residuary legatee would be determined at the time the final distribution of the Estate was made * * *."

That in accordance with the petition of December 28, 1966, the judge of the Probate Court entered two orders

ex parte on December 29, 1966, not only deleting the previous direction of December 14, 1966 to the executors to distribute the income to the Foundation, but also deleting finding of fact No. 7 and affirmatively finding that "it is not desirable and not in the best interest of the estate that a partial distribution * * * be made to the Bush Foundation, a contingent residuary legatee, on or before December 31, 1966." That the finding that the Foundation was "a contingent residuary legatee" necessarily impinged upon the provisions of Mr. Bush's will and his intent, known to defendants March, Arrowood, Post and Dickman, that the residue of his estate be received by the Foundation and that such receipt was not in any way conditional following Mr. Bush's death.

That subsequently, at meetings of the board of directors of the Foundation on January 14 and January 28, 1967, plaintiffs Bassler and Lee, in behalf of themselves and of plaintiff Edyth Bush and in the interest of the Foundation, expressed to the directors the dangers to the Foundation because of the December 29, 1966 orders. That they pointed out the implications from the executors' statements in the petition, the deletions from the December 14, 1966 orders and the implication from the use of the word "contingent" in said orders, and that the Foundation's right to take was jeopardized by the action of the executors and the court order. Plaintiffs Bassler and Lee then moved at each of the meetings for the adoption of a resolution authorizing the Foundation to appeal the court orders insofar as they adversely affected the Foundation. At each of the meetings plaintiffs Bassler and Lee, a majority of the Class B directors, with the approval of plaintiff Edyth Bush, the third Class B director, voted to adopt the resolution; however, defendants March, Arrowood and Post voted against the resolution and made it clear they

were in accord with the December 29, 1966 orders and were opposed to appeal. At the January 14 meeting Walter N. Trenerry was absent and did not vote on the resolution. At the January 28 meeting defendant Devitt abstained from voting.

That at these meetings on January 14 and 28, 1967, defendants March, Arrowood and Post expressed doubt that the Foundation could take the bequest and indicated that subsequent events might make the Foundation unable to take. Defendant March, with tacit approval of defendants Post and Arrowood, stated that final distribution might not be made for several years. In truth and in fact, the Foundation, at the time of Mr. Bush's death, and at all pertinent times, was the residuary legatee under the will.

That subsequently, on February 3, 1967, plaintiff Edyth Bush, individually, and plaintiffs Edyth Bush, Bassler and Lee, as members and directors of the Foundation, separately took appeals to this court. On February 17, 1967, defendant March, purporting to act as president of the Foundation but without submission to any meeting of the directors, contrary to the Foundation's intent and in breach of his fiduciary duty, filed a motion to dismiss the Foundation's appeal and the appeals of the Class B directors of the Foundation. The motion is based on the alleged failure of a majority of the Class A directors to vote in favor of the appeal. The motion is still pending.

That it was the duty of defendants March, Post and Arrowood, as directors, to give undivided loyalty to the Foundation and not engage in activities in conflict with the Foundation for the benefit of other persons or institutions. That it was the duty of the executors Arrowood and Dickman to support the will of Mr. Bush and the bequest to the Foundation and not to aid or encourage

any person in conflict with the Foundation, such as the A. G. Bush Institute, to attempt to defeat the Foundation's bequest and to take in its place as an alternate legatee. Nevertheless, in direct conflict with their duty, the defendants activated the then lifeless Institute for the purpose of creating an apparent rival alternative legatee which might take to the exclusion of the Foundation.

Plaintiffs' Petition for Partial Distribution in the Probate Court

On June 6, 1967, plaintiffs, on behalf of the Foundation, filed a petition in the Probate Court for a Decree of Partial Distribution, wherein they asked that the residue of Mr. Bush's estate, less reserves required, be assigned to and invested in the Foundation, and, in the alternative a Decree of Partial Distribution be entered or ordered that there be a Declaratory Judgement and Decree or an Interlocutory Decree, determining that the Foundation is the residuary legatee under Mr. Bush's will and entitled to receive the residue of the estate. That at a regular meeting of the board of directors of the Foundation on June 24, 1967, plaintiffs Bassler and Lee, with approval of plaintiff Edyth Bush, moved the adoption of a resolution that the Foundation and its officers and directors appear in Probate Court proceedings in support of plaintiffs' petition or otherwise take action necessary to assure assignment of the residue. The Class B's voted in favor of the resolution. Defendants March and Post voted against the resolution. Defendant Arrowood at first abstained but following recess and conference with defendants March and Post changed his vote and voted in the negative to defeat the resolution. Defendants March, Arrowood and Post voted against the resolution as part of their unlawful combination with the executors, with de-

fendant Arrowood acting as both a Class A director and co-executor, to prevent the Foundation from receiving the residue of the estate. That their action was a direct and flagrant breach of their fiduciary duties to the Foundation.

Disloyal Opposition by Class A Directors to Distribution to Foundation in Probate Court

That on or about June 29, 1967, the attorney who represented defendants March, Arrowood and Post in Probate Court on December 14, 1966, filed an affidavit of defendant March in Probate Court proceedings, attacking plaintiffs' petition for partial distribution on determination that the Foundation is the residuary legatee. One of the principal reasons given was the defeat of the plaintiffs' resolution to support the petition for distribution. That at the pre-trial conference between the Honorable Andrew Glenn, Judge of the Probate Court, on July 11, 1967, defendants March, Post and Arrowood appeared, through their attorney, in opposition to plaintiffs' petition and asserted the supposed lack of capacity of plaintiffs to prosecute the petition in behalf of the Foundation. That the attorney sought to delay the hearing on the merits of plaintiffs' petition. That he informed the court that any order favorable to the Foundation would be appealed to the Supreme Court of Minnesota. That thereafter at successive pretrial conferences the same attorney on behalf of the defendant directors and attorney for defendant executors consistently and repeatedly opposed any hearing on the petition prior to entry of final decree in Mr. Bush's estate. That on July 11, 1967, the same attorneys, on behalf of March, Post and Arrowood, informed plaintiffs that no distribution would be made of the residue of the

estate until the abolition of the bicameral board. That such abolition was proposed in the expectation that it would place control of the management of the Foundation in the hands of the four defendant directors. That on August 29, 1967, defendant directors caused a meeting of the Foundation board of directors to be held pursuant to notice, which included resolutions to be proposed at the meeting. The resolutions amounted to an offer by the defendant directors to withdraw their disloyal opposition to distribution on condition that plaintiff directors consent to and vote for the restoration of a board of seven directors of one class to be controlled by four defendant directors. None of the proposed resolutions was adopted. At the same meeting plaintiffs Bassler and Lee proposed and voted for a resolution that the Foundation seek distribution to it of the residuary estate, which resolution failed because all four defendant directors refused to support it. That at the meeting the defendant directors attempted to abolish the bicameral board, thereby expecting to obtain control of the Foundation and the eventual total exclusion of plaintiffs and Mr. Bush's family from management.

Improper and Excessive Fees Sought
by Defendant Executors As Expense
of Foundation

Although entitled to no fees because of their improper and disloyal conduct, defendant executors, with consent of defendant directors and at the expense of the Foundation and its charitable beneficiaries, have sought huge and improper fees for themselves and their agents and attorneys, including a one-half million dollar personal fee to each of defendant executors and an additional one-half million dollar fee for their fiscal agent. That on Decem-

ber 18, 1968, at a hearing in the Probate Court on defendant executors' petition for allowance of fees, counsel for plaintiffs appeared and objected to the allowance of any further fees as being improper and excessive. Defendant directors did not object to the petition but sought and obtained a continuance so that the Foundation directors could meet and consider the propriety of the fees. That the defendant directors had theretofore failed and refused to attend a directors' meeting for said purpose. That the defendant directors had no intention of calling or attending a later meeting of the Foundation directors. Defendants, other than the Attorney General, thereby revealed that one of the objects of their unlawful combination was to secure for the defendant executors improper and excessive fees and expenses. That as a result thereof, the Foundation is threatened with irreparable damage and loss.

Threatened Refusal of Class A
Directors to Attend Foundation
Directors' Meetings

On December 27, 1967, attorneys for the defendant directors notified plaintiffs' counsel that no further meeting of the Foundation board of directors would be held, and defendant Post, on behalf of all defendant directors, confirmed to plaintiffs Bassler and Lee and others that the defendants would not attend any further meetings of the board of directors, whereby defendant directors violated their fiduciary duties and threatened to impede and interfere with the normal charitable functions of the Foundation. That plaintiff Class B directors have diligently functioned as directors and have performed their fiduciary duties to the trust represented by the Foundation and the beneficiaries. That plaintiffs remain at all times

ready to serve the Foundation and carry out its purposes. That the threats by the defendant directors were in furtherance of their unlawful combination and in breach of their fiduciary duties.

That on December 27, 1967, counsel for Class A directors distributed to plaintiffs' counsel copies of an Order to Show Cause and Petition in the Probate Court of Ramsey County in the Estate of Mr. Bush for an order vacating that Court's order dated August 30, 1966, approving the compromise settlement agreement dated August 27, 1966. Said petition is without merit and improperly alleges matters, which even if meritorious, could only be adjudicated by a court of general equity jurisdiction. That by said action the defendants have further attempted to delay and defeat distribution of the residuary estate.

That the defendants March, Arrowood and Post are unsuitable, disqualified and should be removed as members, directors and directors of the Foundation because of their disloyal conduct toward it. That this court should provide for the election of their successors, direct the Foundation and its directors and officers to join in the appeal to this court from the Probate Court order of December 29, 1966, and to seek immediate distribution of the residue.

That the defendants Arrowood and Dickman are unsuitable, disqualified and should be removed as executors and, in the alternative, the Foundation should be directed to apply to the Probate Court for such removal. That the defendant March is named in Article 11 of Mr. Bush's will as the first successor executor, and the will further provides that the other directors of the Foundation are to serve in the order of their seniority as executors. That the defendants March and Post are hostile, unsuitable and have disqualified themselves as possible successor executors and should be declared ineligible.

That in the event defendants March, Arrowood and Post are not removed as members, directors and officers of the Foundation, or in the event defendants Arrowood and Dickman are not removed as executors, they should be enjoined from any further violation of their fiduciary duties, and each of said defendants should be enjoined from interfering with or attempting to delay distribution of the residue of Mr. Bush's estate to the Foundation.

That as a result of the wrongful acts by and the unlawful combination by the defendants March, Arrowood and Post as members, directors and officers of the Foundation and the defendants Arrowood and Dickman as executors, to delay and prevent distribution of the residue of the estate, the Foundation has suffered serious monetary damages. That if said defendants succeed in delaying such distribution, larger monetary loss will be suffered. That all such monetary damage should be determined and assessed by the court against the defendants other than defendants Devitt and the Attorney General.

Prayer for Relief

Plaintiffs pray that this court find:

1. That the Bush Foundation is, and became as of the date of death of Archibald G. Bush, deceased, the sole residuary legatee and entitled to receive distribution of the entire residue of the estate.

2. All of the defendants, except the Attorney General, are under a fiduciary duty to use their best and most diligent efforts to obtain immediate distribution to the Foundation of the residue of the estate of Mr. Bush and under a corresponding fiduciary duty not to delay, oppose or prevent distribution.

3. All of the defendants, except the Attorney General, are prohibited by their fiduciary duties, from taking the position or in any way asserting that the Foundation is not entitled to the residuary estate, and that the defendants, except Devitt and the Attorney General, have improperly and unlawfully opposed, sought to prevent and delayed distribution of the estate to the Foundation.

4. Defendants, other than Devitt and the Attorney General, have combined with each other for the improper and unlawful purpose of preventing, opposing and delaying distribution of the residue of said estate to the Foundation.

5. Each of the defendants March, Arrowood and Post are unsuitable and have disqualified themselves as members, directors and officers of the Foundation.

6. Defendants Arrowood and Dickman are both unsuitable and have disqualified themselves to act as executors of Mr. Bush's will. The executors should be required to resign or the Foundation should be directed to apply to the Probate Court for their removal.

7. Defendants March and Post are unsuitable and disqualified to serve as successor executors and should be restrained from serving or attempting to serve in such capacities.

Answer and Separate Counterclaim of Attorney General of the State of Minnesota in Edyth Bush, et al. v. Herschel S. Arrowood, et al., No. .....

By counterclaim the Attorney General of the State of Minnesota, on behalf of the Bush Foundation and the public, counterclaimed against plaintiffs Edyth Bush, Clarence J. Bassler, Jr., and H. Clifford Lee, alleging that Edyth Bush, while a member and director of the Bush

Foundation and chairman of its board of directors and while under a fiduciary duty to the Foundation, committed acts in breach of her fiduciary duties to the Foundation and the public, and acquiesced in breaches of fiduciary duty committed by others in that she stated to the executors of the estate and to the other directors of the Foundation and the Foundation itself that she would seek to void her consent to Mr. Bush's Last Will and Testament and, if successful in setting aside such consent, would elect to take her statuory share of Mr. Bush's estate in lieu of the testamentary provisions, thereby reducing by approximately one-half the amount of the legacy unless a claimed ambiguity in Article 4 of the will was resolved to her full satisfaction and unless she was provided with funds with which to pay certain fees and expenses of her personal attorneys, and to pay for the maintenance of office facilities, office equipment and books, and to pay staff salaries, accountant fees and the like, and unless she was provided with a means of exercising an effective veto power over the activities of the Foundation's board of directors and over the Foundation itself.

That such claim on the part of Edyth Bush resulted in the Agreement of Compromise and Settlement dated August 27, 1966, which provided, inter alia, for payment in cash of $2,100,000 to Mrs. Bush from the residue of the estate. Such claim also resulted in the amendment of Articles and By-Laws of The Bush Foundation so as to provide for the establishment of two separate and distinct classes of members upon the so-called "bicameral" basis under which the powers of the directors of the Foundation should be exercised exclusively by a majority vote of the two classes. That while some portion of the $2,100,000 cash sum settlement may have been the estimated cost of continued maintenance of the Florida resi-

dence, as provided in the Will, the balance of the cash settlement was an amount paid to Edyth Bush to be used to pay office expenses and fees for two of her personal attorneys during the expected duration of the probate proceedings in Mr. Bush's estate. That while there may have been some basis, in view of the language of Article 4 of Mr. Bush's will, for payment of the cash settlement to defray the cost of maintenance of the Florida residence, no provision in the will justified the balance of the payment of the cash settlement. That the consequence of consummation of the Agreement of Compromise and Settlement was wrongful diminution of Mr. Bush's estate. That the action of plaintiff Edyth Bush was a breach of the fiduciary duty which she owed to the Foundation. That the establishment of the bicameral board of directors was and is unlawful and contrary to the provisions of the Minnesota non-profit corporation act and is unlawful and contrary to the best interest of the Foundation and its beneficiaries.

That Edyth Bush, while a member, director and chairman of the board of directors of the Foundation, and while under a duty of undivided loyalty to the Foundation and the public, sought and obtained the advice, counsel and assistance of one of the attorneys for the executors of the estate and one of the attorneys for the Foundation and of plaintiff H. Clifford Lee, who was then a director of the Foundation, one of the attorneys for the Foundation and one of the attorneys for the executors of the estate, and of Philip Stringer, who was then one of the attorneys for the executors, with respect to ways in which she could achieve the results which she was successful in realizing by reason of her assertion that she would seek to void her consent to Mr. Bush's will; and the attorneys counseled and advised her to make the claims and assertions that she did make that resulted in the

Agreement of Compromise and Settlement dated August 27, 1966, and the creation of the bicameral board of directors of the Foundation. That by so doing, plaintiff Edyth Bush induced David R. Roberts and H. Clifford Lee to violate the fiduciary and professional duties which they owed to the executors of the estate and to the Foundation.

That under the terms of the Agreement of Compromise and Settlement of August 27, 1966, plaintiff Edyth Bush required the executors of the estate to agree to continue the services of her personal attorneys, David R. Roberts, H. Clifford Lee and Philip Stringer, as attorneys for the executors for the duration of Mr. Bush's estate, unless sooner discharged for cause, despite their aforesaid breaches of loyalty which they owed to the executors of the estate and to the Foundation.

That at various times since the decease of Mr. Bush, Edyth Bush has demanded that she have personal control over grants made by the Foundation and over other matters pertaining to its operation and management, and to achieve this, requested directors of the Foundation, the executors of the estate and others, including the attorneys for the executors, to sign an oath of loyalty to her personally.

That through her counsel and co-director, plaintiff H. Clifford Lee, Mrs. Bush asserted that she would change her will, deleting The Bush Foundation as a residuary legatee, if other members and directors refused to amend the Articles and By-Laws of the Foundation to increase the number of members and directors from seven to nine, with her personal attorneys, David R. Roberts and Philip Stringer, being added as members and directors of the Foundation.

That plaintiff Edyth Bush, while a member and director of the Foundation and chairman of its board of directors and while under the duty of protecting the Foundation's interest as residuary legatee, has acquiesced in the unconscionably high and unreasonable attorneys' fees proposed to be paid out of the estate.

After hearing on the cause was commenced, but prior to its final determination, the parties entered into Stipulation of Settlement as follows:

DISTRICT COURT, SECOND JUDICIAL DISTRICT
STATE of MINNESOTA,
COUNTY of RAMSEY

356691

Edyth Bush, et al.,
Plaintiffs,

-vs-

Herschel S. Arrowood, et al.,
Defendants.

STIPULATION OF SETTLEMENT

The above-entitled matter came on for trial before Otis H. Godfrey, Jr., Judge of District Court on September 10, 1966. Appearances on behalf of the Plaintiffs were made by Benno F. Wolff and David C. Donnelly, of the firm of Oppenheimer, Hodgson, Brown, Wolff & Leach, West 1781 First National Bank Building, St. Paul, Minnesota; and by Thomas P. Healy and Theodore Diller, of the firm of Lord, Bissell & Brook, Chicago, Illinois. Appearances were made on behalf of the Defendants Arrowood and Dickman

by Bertrand Poritsky and Neil Convery, of the firm of Smith, Blomquist, Vitko and Rummel, West 880 First National Bank Building, St. Paul, Minnesota. Richard J. Leonard, Sydney C. Berde and Alan Weinblatt, of the firm of Altman, Geraghty, Leonard & Mulally, 707 Degree of Honor Building, St. Paul, Minnesota, appeared for defendants March, Post and Devitt. The Attorney General was represented by Robert J. Christianson, Wright W. Brooks and John Harris, Special Counsel, 1260 Northwestern Bank Building, Minneapolis, Minnesota.

The matter having been tried for three days, the parties thereto, through their respective undersigned counsel do now here stipulate and agree as follows:

1. The affairs of The Bush Foundation shall be managed by a Board of sixteen (16) member-directors during Mrs. A. G. Bush's lifetime and thereafter by a Board of fifteen (15) member-directors to be constituted as hereinafter specified.

2. Mrs. A. G. Bush shall be a lifetime member-director and shall be Chairman of the Board. Upon her death, this member-directorship shall terminate and the Board shall thereupon and thereafter consist of fifteen (15) member-directors; and the office of Chairman of the Board shall no longer exist, and the duties of the Chairman shall devolve upon the President.

3. There shall be a class of three (3) member-directors to be known as the Bush Family Member-Directors, consisting initially of C. J. Bassler, Jr., H. Clifford Lee, and one other member-director to be designated by them who shall be subject to the approval of the Attorney General, which approval shall

not unreasonably be withheld. The Articles and By-laws shall provide that the three (3) Bush Family Member-Directors shall serve for an initial term of six (6) years, with elections subsequent to such initial term to be for terms of three (3) years. The Bush Family Member-Directors, voting separately and as a membership class, shall have the sole right to elect three (3) Bush Family Member-Directors, and fill any vacancies in such membership class.

4. There shall be twelve (12) additional member-directors, consisting of the following: Cecil C. March, The Honorable Edward J. Devitt, Elmer L. Andersen, Reuel D. Harmon and eight (8) additional member-directors to be selected as follows: The four member-directors above named shall designate four proposed addtional member-directors, two from within the State of Minnesota and two from without the State. The Bush Family Member-Directors shall likewise designate four proposed additional member-directors, two from within the State of Minnesota and two from without the State. With respect to all of the eight (8) proposed additional member-directors:

a) The four directors above named shall submit to the Attorney General for approval or disapproval the names of the four additional member-directors they propose, and the Bush Family Member-Directors shall similarly submit for approval or disapproval the names of the four additional member-directors they propose. Approval of the names so submitted shall not be unreasonably withheld. The parties shall not propose as member-directors persons who are directly or indirectly employed by or closely affiliated, through stock ownership, directorship or otherwise, with any corporation whose stock or securities constitute 5%

or more in value of the portfolio of investments held by the Foundation.

b) Following approval by the Attorney General, the names of the additional member-directors designated by the four directors above named shall be submitted to the *Bush Family Member-Directors* for approval, and conversely, the names of the additional member-directors designated by the Bush Family Member-Directors shall be submitted to the four above named directors for approval.

(c) Should any proposed new member-director be disapproved by the Attorney General or by the non-designating group, the group which designated such disapproved member-director shall submit to the Attorney General the name of another proposed member-director for approval or disapproval.

d) The addition of new members for inclusion in the Court approved settlement shall be completed within thirty (30) days from the date hereof.

e) No settlement of the litigation shall become binding until the names of eight (8) additional member-directors shall have been presented to and approved by all of the foregoing parties.

5. The terms of all present member-directors as well as the terms of the additional member-directors, other than those of the Bush Family member directors and Mrs. Bush, shall be initially set at three (3) years, with elections subsequent to the initial term to be for terms of three (3) years.

6. Member-directors (other than Mrs. Bush) shall not be eligible for election or re-election after attaining age 70.

7. The Foundation shall adopt a bylaw disqualifying for election, or re-election as a member-director any person, other than present member-directors, directly or indirectly employed by or closely affiliated, through stock ownership, directorship or otherwise, with any corporation whose stock or securities constitutes 5% or more in value of the portfolio of investments held by the Foundation.

8. Member-director vacancies, other than those in the Bush Family member-directorships, at any time occurring, whether by expiration of term or otherwise, shall be filled by the affirmative vote of not less than eight (8) of all of the member-directors then in office, at a duly and regularly constituted meeting.

9. A quorum for the transaction of business shall consist of nine (9) member-directors. The member-directors shall vote unicamerally on all matters, including, in their capacity as members, election of member-directors (other than the Bush Family Member-Directors), action being by affirmative vote of not less than eight (8) members of the entire Board, except that no amendments to the Articles or Bylaws adopted pursuant to this agreement, or action relating to any corporate merger, consolidation, reorganization, liquidation or dissolution, shall be adopted except by concurrent vote of the majority of the Bush Family Member-Directors, and a two-thirds vote of the other member-directors voting separately as a class, and provided further that action by two-thirds of the entire Board shall be required to amend the other Articles and Bylaws of the Foundation.

10. Promptly after the entry of the decree herein, and not later than ten (10) days thereafter, the

newly-constituted Board shall meet and elect a new President, and conduct such other business as may be appropriate. The Foundation shall adopt a Bylaw that any President having served three (3) consecutive years (12-month periods) from and after January 1, 1966, shall not again be eligible for election or reelection as President.

11. Voting of shares of stock or securities of all companies represented in the Foundation portfolio of securities shall be a matter for determination by the Board.

12. There shall be no recovery of the $2,100,000 paid to Mrs. A. G. Bush in consideration of her execution of the Settlement Agreement of August 27, 1966, and the waiver by her of any right to renounce the Will of Archibald G. Bush, which Settlement Agreement and payment have been approved as in the best interests of the Estate by the Probate Court of Ramsey County, Minnesota.

13. There shall be no recovery of fees and expenses heretofore paid to the executors, their fiscal agent and their attorneys, which have been finally determined by the Probate Court of Ramsey County, Minnesota.

14. Additional fees and expenses, if any, to be paid out of the Estate to the executors, their attorneys and the fiscal agent, shall be approved by the Probate Court in a proceeding in which notice shall be given to the Foundation after the Board is newly constituted, and to the Attorney General.

15. The Court may award the sum of $50,000 to the plaintiff 'B' directors, and the sum of $50,000 to the defendant 'A' directors, including former 'A' di-

rectors, as allowances for attorneys' fees, costs, disbursements and expenses in this litigation, including fees for services to be rendered and costs, disbursements and expenses to be incurred by counsel incident to consummating this settlement, and if the Court makes any such award, the decree entered herein shall direct the Foundation to pay the sums awarded, and shall provide that payment thereof constitutes satisfaction in full to the parties aforementioned and their counsel of any claims that any of them may have against the Foundation for any legal services rendered or to be rendered incident to this litigation and the settlement thereof, and all costs, disbursements and expenses incurred or to be incurred therein.

16. The Court shall retain jurisdiction to determine upon proper application whether any attorneys' fees and expenses are to be paid by the Foundation to defendant Attorney General or his counsel, and if so, the reasonable amount thereof.

17. Counsel for the Attorney General shall have exhibited to them Mrs. A. G. Bush's Will of April 9, 1966, and shall receive a copy thereof for their confidential use for the purpose of enabling them to investigate concerning the validity of the execution of said Will, the competency of the testatrix, any claims concerning undue influence incident to its execution, and any claims that there existed a contract on the part of Mrs. Bush to leave any part of her estate to The Bush Foundation. If after such investigation it is the opinion of counsel for the Attorney General that no such claims should be made by The Bush Foundation, said counsel shall render an opinion to Benno F. Wolff and Richard J. Leonard, attorneys in this action, to that effect, and shall recommend to the Court

that no action shall at any time be taken by The Bush Foundation to assert any claim to any part of Mrs. Bush's Estate under said Will of April 6, 1966, or any prior Will of hers, and the Court shall thereupon enter an order binding upon the Foundation, its directors and parties defendant, enjoining them from taking any action or making any claim on behalf of The Bush Foundation or otherwise under Mrs. Bush's Will of April 9, 1966, or any prior Will of hers, or from making any claim or asserting in any action that there existed any contract on her part to leave any part of her estate to The Bush Foundation. If counsel for the Attorney General do not render such an opinion within twenty-five (25) days after receipt of a copy of Mrs. A. G. Bush's Will of April 9, 1966, the plaintiffs shall have the right to withdraw from this settlement agreement within five (5) days from the expiration of such twenty-five (25) day period.

Counsel for the Attorney General shall be paid reasonable fees and expenses by the Foundation for their services incident to the foregoing.

18. The Articles and Bylaws of the Foundation shall be amended to effectuate this settlement.

19. Except for matters as to which the Court retains jurisdiction herein, and except for the relief to be granted hereunder, a decree shall be entered dismissing with prejudice this action, including all claims, counterclaims and cross-claims of or against the parties thereto and against persons not parties thereto with respect to whom claims were asserted in or during the pendency of the action. The foregoing includes all such claims asserted in the action against defendants Arrowood and Dickman, but nothing in this

stipulation or the decree to be entered shall preclude any objection, based upon the allegations in the pleadings herein or for any other reason, to fees or expenses to be sought by the executors, their attorneys or fiscal agents in the Probate Court of Ramsey County, Minnesota.

20. The executors agree to take prompt action to conclude all pending federal, estate and inheritance tax matters and to procure entry of a final decree in the Probate Court assigning the residue of the estate of Archibald G. Bush to The Bush Foundation.

21. The final settlement shall be approved by the District Court of Ramsey County, Minnesota, in its decree herein, which, subject to the performance of the terms and conditions of this stipulation, shall be entered within forty (40) days from and after the date hereof, and no settlement shall be deemed finally consummated until the entry of said decree.

DATED : September 17, 1969

The foregoing stipulation of settlement consisting of eight (8) pages was entered into this 17th day of September, 1969:

The foregoing stipulation was presented to the court and was incorporated by reference into a judgment and decree. The settlement was approved by the court, which found that there was to be no recovery of the $2,100,000 paid to Mrs. Bush in consideration of her execution of the settlement agreement of August 27, 1966, and the waiver by her of any right to renounce the will of Archibald G. Bush, which settlement and agreement and payment had been approved as to the best interest of the estate of Archibald G. Bush by the Probate Court of Ramsey County, Minnesota. The judgment of the Ramsey County District Court also provided:

Except for matters as to which the Court retains jurisdiction herein, upon compliance with paragraphs 2 and 3 of this Judgment and Decree, notice of which shall be given to the Court and to all parties by counsel for the Attorney General, and without any further or supplemental Order of the Court, the above-entitled action, including all claims, counterclaims and cross-claims of or against the parties thereto (including but not limited to defendants Mary Jane Dickman and Herschel S. Arrowood) and against persons not parties hereto with respect to whom claims were asserted in or during the pendency of the action (including, but not limited to, David R. Roberts, Philip Stringer and Walter N. Trenerry) shall be and they are hereby dismissed with prejudice and without costs other than as hereinabove provided in this Judgment and Decree; provided, however, this Judgment and Decree of dismissal with prejudice shall not preclude any objection, based upon the allegations in the pleadings herein or for any other reason, to fees or expenses to be sought by the Executors aforementioned, their attorneys or fiscal agents in the Probate Court of Ramsey County, Minnesota.

Renunciation of Will

On October 12, 1971, Co-Guardians of the Property of Edyth Bush filed Renunciation of Will of Archibald G. Bush by Surviving Spouse, Edyth D. Bush (Mrs. Archibald G. Bush), wherein they alleged, among other things, that Edyth D. Bush or her attorneys of record entered into certain [illegible] various ramifications of a Consent to decedent's Will and waivers of her right to renounce the Last Will and Testament under and pursuant to certain agreements and stipulations with the Co-Executors of the

Estate of Archibald G. Bush, with certain Directors of The Bush Foundation, and with The Bush Foundation, which were subsequently approved by the Probate Court and the County Judge's Court of Orange County, Florida, or by the District Court of Ramsey County, Minnesota, under dates of August 27, 1966; August 30 and 31, 1966; December 14, 1966; September 17, 1969; and April 30, 1970.

It was further alleged that neither the Estate of Archibald G. Bush, nor The Bush Foundation, nor the Co-Executors of Bush's Estate, nor certain contracting Directors of The Bush Foundation have carried out in full or in substance the undertakings contained or contemplated by the various agreements, orders, understandings, and undertakings signed by them or on their behalf. That in fact, it appears they have repudiated and litigated to set aside major provisions of the August 27, 1966 agreement, have failed to follow certain of the undertakings approved by the August 30 and 31 and December 14, 1966 court orders, and have failed to perform and have defaulted on agreements and terms promised to be performed by them of the September 17, 1969 stipulation and April 10, 1970 District Court decree. And no effort of record has been made to close the Estate nor proceedings started to distribute 500,000 shares of 3M Company stock to The Bush Foundation.

That the undersigned are informed and believe that attorneys of record for Edyth D. Bush in Bush, et al., v. Arrowood, et al., Second Judicial District, Ramsey County, File No. 356691, did not consult Mrs. Bush and did not obtain her personal approval or her authority or her prior consent to enter into the stipulation of September 17, 1969 before that Court, nor discuss with her the details thereof; nor did they obtain approval of the

decree of April 10, 1970, nor of its details, nor obtain her permission to forego appeal to the Supreme Court of Minnesota before July 10, 1970.

That in order to protect the rights of the Ward, the Co-Guardians filed the renunciation (on behalf of the Ward) of the Will of Archibald G. Bush and irrevocably renounced the Will of the decedent dated April 21, 1965, and refused to accept the provisions of the same and elected to take the statutory share of decedent's estate.

The Co-Guardians also filed on October 12, 1971, Renunciation of Will which was signed by Edyth Bush on the 5th day of August, 1966.

Disposition of Renunciation of Will

On March 1, 1972, Andrew A. Glenn, Judge of the Probate Court for Ramsey County, Minnesota, entered an Interlocutory Decree, finding that the purported renunciation dated August 5, 1966, and the purported renunciation dated October 7, 1971, by the Co-Guardians of no force or effect and found there had been no effective renunciation of the will, denied permission to the surviving spouse and her co-guardians to elect to renounce the will and found that The Bush Foundation is the only legatee entitled to receive all of the remaining assets of the estate in their entirety, less expenses and disbursements as the court might allow, and further found that the widow and her co-guardians have no remaining interest in the assets of the estate. The co-guardians thereafter filed notice of appeal from the order of the Probate Court of Ramsey County. The appeal is pending in the District Court of Ramsey County, Minnesota.

Defendants' Motions

Defendants filed numerous motions to dismiss, wherein they move that the cause be dismissed for a variety of reasons. The Court will hereafter treat these motions separately as to the various bases alleged by the defendants in support of their motions.

Jurisdiction

Defendants move to dismiss for lack of jurisdiction in this court of the subject matter of the litigation. It is charged that the action consists of probate matters relating to the Estate of A. G. Bush, that the estate is currently pending in the Probate Court in Ramsey County, Minnesota, and that the matters pending in probate are within the exclusive jurisdiction of the Probate Court.

From the earliest probate cases in the federal courts, a line has been drawn between claims seeking to contest management or to effect a distribution of property and those merely seeking a judgment in personam declaring plaintiff's right to receive from the fiduciary an interest in the estate. It has been consistently held that in a case between diverse citizens the federal courts will determine a controversy concerning the right of the plaintiff to share in the res; while it has at the same time been established that they will decline to undertake the general administration of the estate. As to purely probate matters, the federal courts are without jurisdiction; however, in controversies that are not regarded as purely probate matters, the federal courts have jurisdiction. Beach v. Rome Trust Company, 269 F.2d 367 (2nd Cir., 1959).

Defendants argue in support of their motion that plaintiff's claims relate entirely to the estate of A. G. Bush, that this estate is presently being probated in the Probate

Court in Ramsey County, Minnesota, and that, therefore, the matters are purely probate matters and are exclusively within the jurisdictiom of the State Probate Court.

In great measure the matters alleged in the complaint do in fact relate to matters of probate and to some degree to matters which are purely administrative and are properly within the exclusive jurisdiction of the Probate Court, and the prayer of the complaint does affect matters which are purely probate; yet, taking the complaint in its entirety, including the prayer for relief, the court is unable to say that all matters raised therein are purely of a probate nature and exclusively administration of probate matters over which the probate court would have sole jurisdiction. These matters over which the probate court has exclusive jurisdiction and has previously dealt will be more fully developed hereafter, as will also those matters which are not of a purely probate nature.

Considering the complaint in its entirety, the Court finds that there are sufficient allegations to show the existence of jurisdiction in this court over at least a portion of the matters and things alleged in the complaint. In support of jurisdiction in this court, plaintiffs cite and strongly rely on Bulau v. Bulau, 208 Minnesota 529, 294 N.W. 845. In Bulau plaintiff had petitioned the probate court to open the estate of one August Bulau to allow the plaintiff to file a claim for board, lodging and services provided and furnished decedent. The plaintiff's claim, however, was not filed within the allowable period and plaintiff had notice of the time within which claims were to be filed. Plaintiff did not appeal denial of the petition in the Probate Court but did file a suit in the District Court, alleging her claim against the estate and alleged that the defendant representative, before expiration of the time within which she would have been permitted to file

claim, represented to her that if she would refrain from filing her claim, he would pay the same after the estate had been settled. It was further alleged that the defendant representative did not intend to keep his promise at the time it was made, that he intended to deceive her, and that she relied on his statement in good faith and was damaged to the extent of her barred claim. The Supreme Court held that the District Court did in fact have jurisdiction of plaintiff's cause of action based on fraud.

There are allegations in the complaint which would seem to bring it within the authority of the Bulau case, supra. If the District Court in Minnesota had jurisdiction over such a claim as the Supreme Court there held it did, then jurisdiction would exist in this court on the basis of diversity, if all the other requirements for diversity are present. The allegations of the complaint are sufficient to show that diversity does in fact exist.

The Court finds that it does in fact have jurisdiction.

Capacity to Sue

Defendants move to dismiss for lack of plaintiffs' capacity to sue, alleging that plaintiffs are foreign guardians appointed by a foreign court and, therefore, have no capacity to bring this action under the laws of the State of Minnesota.

Rule 17.02 of the Minnesota Rules of Civil Procedure provides in pertinent parts as follows:

> Whenever a party to an action is an infant or is incompetent and has a representative duly appointed under the laws of this state or the laws of a foreign state or country, the representative may sue or defend on behalf of such party * * *.

It is apparent that under the provisions of Rule 17.02 these representatives, having been appointed guardians by the County Judge's Court in and for Orange County, Florida, as guardians of the Property of Mrs. Bush, have authority to act in her behalf in the State of Minnesota and, therefore, have capacity to bring this suit here.

Res Judicata

A sentence, judgment, or decree of a court acting within its jurisdiction is res judicata, preventing the fact or matter adjudicated from being re-litigated in the same or any other court between the parties and privies, whether the court rendering it had general, inferior, special, limited, concurrent, or exclusive jurisdiction, or at least this is true in respect of inferior courts where such courts, although with lesser jurisdiction, function as courts of law with some form of pleadings, and in accordance with legal rules of evidence and right of representation by counsel. While the rule is applied as between different coordinate branches of the same court, and as between coordinate courts of different counties, the relative rank of the courts involved is immaterial. If the judgment is one which in its nature operates as res judicata, it is binding on all other courts, even the highest, although rendered by the lowest court in the judicial system.

It is essential, however, to the conclusiveness of a judgment or decree rendered by a court that the court have jurisdiction of the subject matter and of the parties, and that the judgment be rendered by the court while it is acting in a judicial, rather than in some other, capacity.

The doctrine of conclusiveness of judgments applies to the final judgments, decrees, and orders of appellate courts, county courts, juvenile courts, and municipal

courts. So also the character of conclusiveness attaches to the final judgments, decrees, and orders of a probate court, or of a court vested with probate jurisdiction, provided it has jurisdiction of the parties and subject matter. 50 C.J.S. Judgments § 689, pp. 146, 147.

The doctrine is but a manifestation of the recognition that endless litigation leads to chaos; that certainty in legal relations must be maintained; that after a party has had his day in court, justice, expedience, and the preservation of the public tranquillity requires that the matter be at an end.

> 'It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.' Schroeder v. 171.74 Acres of Land, etc., 318 F.2d 311 (8th Cir. 1963).

The Minnesota rule of res judicata and related collateral estoppel is the same as the general rule almost universally applicable. In United States v. Munsingwear, Inc., 340 U.S. 36, the United States Supreme Court referred to the "classic statement of the rule of res judicata in Southern Pacific R. Co. v. United States, 168 U.S. 1," as follows:

> The general principle announced in numerous cases is that a right, question or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same

parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. National Farmers Union Property & Cas. Co. v. Fisher, 284 F.2d 421 (8th Cir. 1960).

The law of res judicata is firmly established and provides that whenever a court having proper jurisdiction has rendered a final judgment upon the merits of a cause of action, that judgment is binding upon the parties thereto. This is true not only as to the issues actually litigated but also as to every matter which could have been litigated. Thus the generally accepted rule is that in subsequent litigation upon the same cause of action as in the prior suit, the parties and their privies are precluded from receiving any additional or differing relief. Thompson v. Zurich Insurance Company, 309 F.Supp. 1178 (U.S.D.C. D.Minn. Second Div. 1970).

A judgment by consent of the parties is a judgment, the provisions and terms of which are settled and agreed to by the parties to the action in which it is entered, and which is entered of record by the consent and sanction of the court. It may be more briefly defined as a contract of the parties acknowledged in open court and ordered to be recorded, an agreement of the parties entered of record with the approval of a court of competent jurisdiction, or a solemn contract or judgment of the parties put on file with the sanction and permission of the court. A consent judgment is not a judicial determination of any litigated right, and it is not the judgment of the court, except in the sense that the court allows it to go upon the record and have the force and effect of a judg-

ment. It is merely the act of the parties consented to by the court.

Consent to entry of judgment implies that the terms and conditions have been agreed on and consent thereto given in open court or by stipulation, and the court has no power to supply terms, provisions, or essential details not previously agreed to by the parties. It has been held, however, that the fact that a judgment is entered by consent of the parties does not deprive it of its judicial character or efficacy.

A judgment by consent is to be distinguished from one rendered on an adjudication made by the court after due consideration and investigation, as following verdict or findings in an adverse proceeding, and such a judgment will not become a judgment by consent even though the parties may have superadded their consent to adjudication of the court. It is similar to a judgment after trial on the merits in that it is binding on the parties, but differs therefrom in that it is not appealable and can be vacated only in certain circumstances for fraud or want of consent. 49 C.J.S. § 173, pp. 308, 309.

Since a judgment by consent is regarded as a contract between the parties, it must be construed the same as any other contract. Its operation and effect must be gathered from the terms used in the agreement, and it should not be extended beyond the clear import of such terms; nor can it be supplemented by agreements which are not a part of it unless attacked for fraud or mistake.

As a consent judgment has the sanction of the court, and is entered as its determination of the controversy, it generally has the same force and effect as any other judgment, although in some respects it may be given greater force than an ordinary judgment, and in other

respects it may be accorded less force. Although the judgment is in the nature of a contract between the parties, the court retains power to see that its provisions are duly carried out. In the absence of fraud or mistake a consent judgment is valid and binding, as such, as between the parties thereto and their privies. The judgment is not invalidated by a subsequent failure to perform a condition on which the consent was based, or by the fact that it obligates the parties to do that which they could not make a valid contract to do; and unless it is vacated or set aside in the manner provided for by law it stands as a final disposition of the rights of the parties thereto. 49 C.J.S. § 178, pp. 314, 316.

Confusion over the nature of a consent judgment has arisen in cases involving res judicata and collateral estoppel. When res judicata is used in the narrow sense as a bar to a subsequent action between the same parties or those in privy with them upon the same claims or demands, most courts hold the consent judgment is a bar and is an adjudication on the merits.

The consent judgment may raise special problems in connection with other matters, such as splitting an action, and collateral estoppel. But the fact remains that the judgment is not an inter partes contract; the court is not properly a recorder of contracts, it is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication. State Bank of New London v. Western Cas. & Surety Co., 287 Minn. 339, 178 N.W.2d 614.

Pangalos v. Halpern, 247 Minn. 80, 76 N.W.2d 702 (1956), was an action brought in the District Court for Hennepin County, Minnesota, by the administratrix c.t.a. of the estate of Arthur Flygen, deceased, to recover $9,000 from defendants Halpern and Schermer, which amount

was paid to them as attorneys' fees pursuant to a settlement agreement for which they negotiated on behalf of plaintiff and the other heirs of decedent. The agreement settled an action against plaintiff and the heirs and was approved by the district court and probate court of Hennepin County. The case was tried before a judge and a jury. At the close of plaintiff's case, the court directed a verdict for defendants. The court, after considering the compromise agreement and setting forth certain details, stated:

> The compromise agreement contained a further provision whereby each of the parties acknowledged that he or she had read the instrument and had voluntarily entered into the agreement with a full understanding of the effect of its terms.
>
> Immediately after the execution of the settlement agreement, plaintiff filed with the Hennepin County probate court her written petition for the approval of the settlement and for authority to carry out its terms. The petition was accompanied by the settlement agreement and also by the written consent of the heirs to the entry of the court's order of approval. * * *, the probate court made its order approving the same. On the same day, pursuant to a stipulation between the parties through their respective counsel, the district court approved the settlement and dismissed the * * * action * * *.
>
> * * * 3 years and 5 months after the settlement had been approved by the probate court, as well as by the district court, plaintiff * * * moved the district court for an order vacating the settlement and the judgment of dismissal in the Evans action. The motion was made on the grounds that the settlement, with respect to the payment of the * * *

> attorneys' fees * * *, was improvident, made without the authority of the plaintiff and the heirs, and procured by the fraud and misrepresentation of such defendants. The motion was denied with findings that the agreement was provident, fully authorized, and made without fraud or misrepresentation.

Upon appeal the court was concerned with the jurisdiction of the probate court to make the order and with the question whether such order was a final adjudication upon the allowance of attorneys' fees and therefore not subject to collateral attack.

The court found that the probate court had jurisdiction to make the order; that there was no dispute between the parties as to the payment or the amount of the attorneys' fees paid when the order was made and found that the probate court is vested with a plenary and exclusive original jurisdiction over the estates of deceased persons in all matters relating to their complete administration, which included the power to allow attorneys' fees, in whole or in part, as a credit in the final account, or at any time during the administration.

The court further stated:

> 2-3 Was the order a final adjudication of defendants' fees for the legal services performed by them in bringing about a settlement of the Evans action? We have heretofore held that an appealable order, affecting a substantial right, made in determining a motion (or upon an application by petition as herein) after a full hearing has been had on a controverted question of fact, which decides a point actually litigated, is an adjudication binding on the parties and is conclusive and res judicata on the point so actually litigated and determined.[2] This rule is applicable

herein. First, it is to be observed that an order made pursuant to § 525.49 directing, or refusing to direct, the payment of attorneys' fees is appealable by either the representative or by the attorney. § 525.71(15). Secondly, the order was not made ex parte since the plaintiff and all the heirs either petitioned for, or expressly consented to, the entry of the order. Except in a strictly literal sense, an order made upon the application, or with the consent, of all the interested parties is not ex parte.[3] The fact that such an order is made upon an agreed statement of the facts or is entered by consent or upon the agreement of the parties does not lessen its force or effect,[4] and it is as binding upon the parties as if made after protracted litigation. * * *. Insofar as decedent's estate is concerned, and in fact likewise with respect to the attorneys and all the heirs, it is clear that the court's order was a final adjudication of defendants' fees for the services they rendered in bringing about a settlement and final determination of the Evans action.

4. As this court pointed out in the Melgaard opinion,[7] ([7]In re Trusteeship Under Will of Melgaard, 200 Minn. 493, 503, 507, 508, 274 N.W. 641, 647, 649) except for the background of jurisdiction in personam rather than in rem as in the instant case, representatives of decedent's estates and trustees stand on the same footing with respect to the finality of orders allowing their accounts, and such orders are only subject to direct attack by an appropriate proceeding such as by motion to open or by appeal. Intermediate orders adjudicating the reasonable value of attorneys' fees to the estate and ordering their payment, like orders allowing final accounts, are in their essence judgments binding as such upon the parties and res judicata as to the subject matter.[8]

5. Since the order herein determining the reasonable value of the attorneys' fees and directing their payment in the course of administration was in essence a final judgment binding and conclusive upon the parties, and res judicata as to the point adjudicated, it falls under the following general rule: In the absence of fraud, a valid judgment, decree, or as here an order which is the equivalent thereof, entered by agreement or consent, operates as res judicata to the same extent as if it had been rendered after contest and full hearing and is binding and conclusive upon the parties and those in privity with them.[9]

6. Since the probate court's order allowing the attorneys' fees was in essence a judgment, plaintiff's collateral attack upon it for fraud is wholly ineffective. A judgment obtained with jurisdiction but by fraud is voidable only—and not void—and it is not subject to collateral attack since it stands in full force and effect until vacated in a direct attack proceeding.[10] In order to be open to collateral attack, a judgment must be void on the face of the record, as for want of jurisdiction.[11]

By this action plaintiff, through her co-guardians, seeks to have this court (1) find and determine that the consent of Edyth D. Bush to the Last Will and Testament of Archibald G. Bush under date of April 12, 1965, was not fairly and reasonably obtained and is null and void and without further force or effect; (2) rescind the agreement of settlement entered into on or about August 27, 1966, between Edyth D. Bush, as surviving spouse of Archibald G. Bush, the defendants Herschel S. Arrowood and Mary Jane Dickman, as co-executors of the estate of Archibald G. Bush, and the defendant, The Bush Foundation, and determine that the plaintiff is entitled to renounce the

Last Will and Testament of Archibald G. Bush; (3) vacate and declare void the stipulation dated September 17, 1969, and the judgment and decree entered thereon on the 10th day of April, 1970, in the District Court of Ramsey County, Minnesota, in the action entitled Edyth Bush, etc., et al., plaintiffs, vs. Herschel S. Arrowood, etc., et al., being File 256691, and requiring the defendant, The Bush Foundation, and the members of its Board of Directors named as defendants herein to amend its Articles of Incorporation and its By-Laws so as to restore the bicameral principle of its board of directors; (4) vacate and set aside the interlocutory decree relative to purported renunciation of will entered in the Probate Court of Ramsey County, Minnesota, on the 1st day of March, 1972, and requiring said court to enter its decree in accordance with the determination of this court in the premises; (5) for an award of damages against such defendants jointly and severally in the sum of $100,000,000 or such other amount as the court and jury may determine; (6) for such other and further relief as the court may determine, including attorneys' fees and plaintiff's costs and disbursements.

In support of her prayer that this court declare the consent of Edyth D. Bush to the Last Will and Testament of Archibald G. Bush was not fairly and reasonably obtained and is null and void and without force and effect and in support of her prayer asking the court to rescind the agreement of settlement entered into on or about August 27, 1966, plaintiff alleges various violations of the terms of the agreement for compromise and settlement of August 27, 1966, by certain of the defendants.

As one of the violations she alleges that under date of December 26, 1967, defendants Herschel S. Arrowood and others, acting individually and as directors of defendant The Bush Foundation, and the defendant, The Bush

Foundation, petitioned the Probate Court of Ramsey County, Minnesota, to set aside and vacate the agreement of settlement of August 27, 1966; that this constituted an act of violation and repudiation of the agreement, and that the petition has never been heard, withdrawn, disclaimed or dismissed. This latter assertion is plainly erroneous as is disclosed by order of the Probate Court entered on the 19th day of November, 1968, wherein the Probate Court entered an order—the final paragraph of which provides as follows:

> IT IS ORDERED that the Petition for an Order Vacating Order Approving Compromise Settlement Agreement and Decree of Partial Distribution Dated August 30, 1966, for a Declaratory Judgment, for an Order to Show Cause, and for Other Relief dated December 26, 1967, be and the same is hereby, dismissed without prejudice.

In her complaint plaintiff fails to allege that the Probate Court for Ramsey County, Minnesota, pursuant to petition of the co-executors, entered its order, approving the agreement of compromise and settlement dated August 27, 1966. On August 30, 1966, co-executors of the estate of Mr. Bush petitioned the Ramsey County Probate Court for approval of the August 27 agreement. This agreement was approved and confirmed by order of the Probate Court on that day. The agreement was also approved by the County Judge's Court of Orange County, Florida, on August 31, 1966. Upon approval of the August 27, 1966 agreement, pursuant to petition of the co-executors, which agreement was signed by plaintiff Edyth Bush and the co-executors, the agreement of compromise and settlement became a judgment of the Probate Court for Ramsey County, Minnesota, and such judgment is, therefore, res judicata as to this court with regard to the matters agreed

to therein. The agreement states, among other things, that Mrs. Bush was fully advised of the nature and extent and character of the estate of her late husband, the provisions made for her in his Last Will and Testament, her right to renounce and refuse to accept provisions of the will, and upon such refusal and renunciation to become entitled to receive one-half of the estate, being approximately $65,000,000. Paragraph 2(b) provides as follows:

> (b) that she (Mrs. Bush) does hereby, upon the advice and with the consent of her counsel, (i) waive her right to renounce the Last Will and Testament of her late husband and refuse to accept the provisions of the said Will, (ii) elect to take under the said Will, and (iii) ratify, confirm and approve her Consent dated April 21, 1965 to the Last Will and Testament of her late husband;

With regard to the matters raised by this complaint as prayed in paragraphs 1 and 2 of the prayer for relief, these matters have been fully adjudicated by the Probate Court of Ramsey County, Minnesota, which had full jurisdiction over the probate matters presented to it and specifically with regard to the agreement of compromise and settlement. In keeping with the authorities above cited, violations of the provisions of that agreement are matters which should properly be presented to the Probate Court for enforcement. That Court, as shown by the above-cited authorities, has jurisdiction for the purpose of enforcing the provisions of the agreement and judgment entered pursuant thereto.

Even if the matters were not res judicata, this court should refrain from exercising its jurisdiction and should and does abstain from assuming jurisdiction over a matter

which was previously before the Probate Court and over which the Probate Court has jurisdiction for enforcement.

If plaintiff seeks to rescind that agreement upon the basis of fraud, then her relief lies in a direct attack in the Probate Court. The matter is not subject to collateral attack in this court—judgment having been entered in the Probate Court.

In paragraph 3 of plaintiff's prayer for relief, she prays that this court vacate and declare void the stipulation dated September 17, 1969, and the judgment and decree entered thereon by the District Court of Ramsey County, Minnesota. In support of this prayer, plaintiff, among other things, alleges that Mrs. Bush had no knowledge of and did not consent or approve of the action of her attorneys of record when her attorneys entered into the stipulation of agreement.

The stipulation and settlement dated September 17, 1969, was presented to the District Court for Ramsey County, Minnesota, and judgment and decree was entered thereon. That judgment is res judicata as to the relief prayed in paragraph 3 of the prayer for relief here.

If, in fact, as is alleged in the complaint, there was fraud involved, then the matter must be presented to that Court for its consideration, since it is at best voidable and not void.

As was stated in Pangalos v. Halpern, supra: "In order to be open to collateral attack, a judgment must be void on the face of the record, as for want of jurisdiction." Even if this court has jurisdiction, based on the alleged failure of Mrs. Bush to consent to the entry of the stipulation, this court should abstain from interfering with the action of the District Court of Minnesota and permit that Court to correct deficiencies found to exist

in any judgment it has entered. Plaintiff does have the opportunity to present such matter to the court under the Minnesota rules and relief is available if her allegations are true.

In paragraph 4 of the complaint, plaintiff prays that this court vacate and set aside the interlocutory decree relative to purported renunciation of will entered in the Probate Court of Ramsey County, Minnesota, on the 1st day of March, 1972. It can hardly be disputed but that the Probate Court of Ramsey County had jurisdiction of the subject matter presented to it by way of the renunciation of will. It had jurisdiction of the subject matter. It entered judgment thereon, which is currently on appeal in the Ramsey County District Court. This Court will, therefore, abstain from taking any action thereon, since there is a claim presently pending in the Minnesota courts concerning this same matter. See Dreyfus v. First National Bank of Chicago, 424 F.2d 1171 (7th Cir. 1970). As was stated in State of California v. Oroville-Wyandotte Irr. Dist., 409 F.2d 532 (9th Cir. 1969):

> Although the District Court has jurisdiction to adjudicate a controversy and to award declaratory relief, whether to entertain the action and grant relief is a matter within the discretion of the court. * * * This discretion is a judicial discretion and must have a sound basis.

The Court further stated:

> * * *, a sound conception of our federal system requires a federal court to withhold intervention with state procedure in the interest of maintaining harmony within the system.

The matters raised in this complaint have been presented to the Probate Court, the District Court, and again to the Probate Court, all in Ramsey County, Minnesota. The plaintiff should not now here be permitted to relitigate the issues which have heretofore been litigated in the prior actions. The sole matter not presented directly to the Minnesota courts is the question of damages. However, the basis for the damages as prayed in the complaint is founded on actions of the parties, directly or indirectly related to one or more of the state court actions. Since all of the matters and factual allegations contained in the complaint and upon which the prayer for damages must ultimately rest have been considered by the Minnesota courts in previous actions, no basis remains to support plaintiff's prayer for damages contained in paragraph 4 of her complaint. Damages as prayed should not properly be granted by this court while the judgments entered in the state courts remain undisturbed; and since the matters upon which the plaintiff's damages are prayed are dependent upon actions heretofore presented to and considered by those courts, this court should not abrogate the functions of the state courts and should not properly proceed in contravention of the judgments entered there so long as those judgments have not been set aside. As previously stated, the proper method of setting aside those judgments is by presentation of a proper action to the court in which the judgment or judgments were entered.

Additionally, it should be pointed out that plaintiff is here asking this court to set aside the agreement which was entered into on August 27, 1966, which agreement was approved by the Probate Court in Ramsey County and the County Judge's Court in Orange County, Florida. She has not however offered to do equity by returning the consideration paid to her, namely, the $2,100,000 and

has not offered to re-convey the stock of the Bush Management Company which was conveyed to her as a result of the settlement agreement for stated considerations. Since the equitable powers of this court are involved, this court should not in any event be asked to provide equity to a party until that party has done equity by returning or offering to return considerations previously received by her, thereby placing the parties in the status they originally enjoyed.

In order to control the length of this memorandum and not to burden this opinion with unnecessary repetition, the facts heretofore related pertaining to the details of the various Minnesota state court actions will not be specifically again set out. However, with regard to the matters presented to the Minnesota state courts, suffice it to say that the Probate Court of Ramsey County had jurisdiction, it exercised its jurisdiction, it approved the stipulation or agreement of contract or settlement which was entered into by the respective parties to that action. It having approved that contract or settlement, the settlement became a judgment, that judgment became final; it is a viable and subsisting judgment and remains a judgment until such time as the court entering the judgment sets it aside—the power for enforcement of which rests properly within the court entering same, namely, the Probate Court of Ramsey County; and if either party has any complaint concerning the judgment which was entered according to their agreement, it is their right or duty to go into the court to whom they presented their contract of settlement and apply to that court for relief, if any they have.

Basically the same matters presented in this complaint were presented to and considered by the District Court

of Ramsey County, Minnesota, in Edyth Bush, et al., plaintiffs, v. Herschel S. Arrowood, et al., defendants, Second Judicial Circuit No. 356691, when the complaint, counterclaim, stipulation and judgment are considered in their entirety. The District Court entered judgment thereon. It had jurisdiction to do so. That judgment remains undisturbed as it must until such time as the court entering it sets it aside. Again, the power for enforcement of the judgment or correction thereof, if it is defective, rests properly within the District Court which entered it. If any of the parties are aggrieved thereby, they must apply to that court for relief, if any they have.

The matters presented here were presented to the Probate Court of Ramsey County, Minnesota, in the renunciation of will action. Judgment was entered by the Probate Court adverse to the plaintiff. That cause is now on appeal to the District Court of Ramsey County, Minnesota.

The general principles set forth in National Farmers Union Property and Cas. Co. v. Fisher, supra, are applicable here. The claimed rights, the questions of fact, were put in issue in the various Minnesota courts and have been determined there. These matters should not again be put in issue in this suit by the same parties or their privies; and even if plaintiff claims that this suit is for a different cause of action, nevertheless, the rights and questions of fact having been determined as between the parties and their privies in the various actions, are to be taken as conclusively established as long as those judgments in those suits remain unmodified.

For the foregoing reasons the Court finds that this cause should be dismissed on the ground of res judicata, collateral estoppel and abstention.

IT IS, THEREFORE, THE ORDER of this Court that this case be and the same is hereby dismissed for the reasons stated herein.

This Court does not reach the question of laches; however, it is pertinent for this Court to point out that there was a delay from 1966, when the action allegedly first arose, until 1971 before any affirmative action was taken on the question of breach of the original agreement. This indeed is a lengthy, if not totally fatal, delay.

Defendants move for an order joining H. Clifford Lee and Clarence J. Bassler as parties. In view of the disposition of the cause above set forth, the Court finds that the basis for the motion to join parties is no longer pertinent to this action. The defendants' motion for an order joining H. Clifford Lee and Clarence J. Bassler as parties will be and the same is hereby denied.

Defendants move to quash plaintiff's request for admissions. Since the Court has disposed of the case for the above-stated reasons, defendants' motion to quash plaintiff's request for admissions will be allowed as the requests are now moot.

Defendants have filed additional motions subsequent to the original motions filed herein, and while these motions are not necessarily dealt with directly by name herein, they are nevertheless resolved by the rulings herein and will not be further considered.

/s/ WILLIAM G. JUERGENS
U. S. Senior District Judge

OPINION OF THE COURT OF APPEALS

(Filed July 8, 1974)

No. 73-1378

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal from the United States District Court
For the District of Minnesota.

CLARENCE J. BASSLER, JR., H. CLIFFORD LEE, and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of Edyth D. Bush, a/k/a Edyth D. Bush, a/k/a Mrs. A. G. Bush, deceased,

Appellants,

vs.

HERSCHEL S. ARROWOOD, individually and as a Co-Executor under the Last Will and Testament of Archibald G. Bush, deceased, and as a former director of The Bush Foundation; MARY JANE DICKMAN, individually and as a Co-Executor under the Last Will and Testament of Archibald G. Bush, deceased; CECIL C. MARCH, individually and as a director of The Bush Foundation; ELMER L. ANDERSEN, individually and as a director of The Bush Foundation; Honorable EDWARD J. DEVITT, individually and as a director of The Bush Foundation; RICHARD L. POST, individually and as a former director of The Bush Foundation; REUEL D. HARMON, individually and as a director of The Bush Foundation; THE BUSH FOUNDATION, a Minnesota Nonprofit Corporation,

Appellees,

and

THOMAS MALONE, as Clerk of the Probate Court, Ramsey County, Minnesota; JOSEPH P. LANASA, as Clerk of the District Court of Ramsey County, Minnesota; and WARREN R. SPANNAUS, as Attorney General of the State of Minnesota,

Nominal Appellees.

Before GIBSON, STEPHENSON and WEBSTER, *Circuit Judges.*

STEPHENSON, *Circuit Judge.*

This diversity suit was brought by the executors of the estate of Mrs. A. G. Bush. The suit is against the executors of the estate of Mrs. Bush's husband, the Bush Foundation, and the foundation's directors and former directors, two of whom are the executors of the A. G. Bush estate. The cause of action is basically for fraud in the distribution of the husband's estate and in the operation of the Bush Foundation. The district court[1] dismissed the complaint on the merits citing the alternative bases of res judicata, collateral estoppel and abstention. We affirm but remand with instructions.

This is a complicated case which began in 1966 with the death of A. G. Bush. We set out the facts that are essential to an understanding of the issues.

A. G. Bush was one of the founders of Minnesota Mining and Manufacturing Company and had thereby amassed a sizeable fortune.[2] In his will, to which Mrs.

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1. The United States District Court for the District of Minnesota, the Honorable William G. Juergens, Eastern District of Illinois, sitting by designation.

2. The figures as to the original value of the estate range from $130-$150 million. The estate as now held by the executors, after three partial distributions to the Bush Foundation, is apparently worth approximately $85 million.

Bush consented, A. G. Bush left the bulk of his estate to the Bush Foundation, a nonprofit Minnesota corporation that he had established in 1953. Shortly following Mr. Bush's death in 1966, a controversy arose among Mrs. Bush, the executors of the husband's estate, and the directors of the Bush Foundation. The conflict arose due to delays in making the estate distributions to the foundation. Mrs. Bush feared that the executors and directors were not carrying out her husband's wishes (at that time the foundation directors included executors Arrowood and Dickman).

Mrs. Bush, in order to get the administration back on what she thought was the right track, threatened to renounce her consent to her husband's will which would have substantially reduced the residuary bequest to the foundation. However, a compromise settlement was reached between Mrs. Bush and the executors and directors. Under the settlement agreement Mrs. Bush agreed to give up her right to renounce the will.[3] The Bush Foundation and its directors agreed to amend the Articles and By-Laws setting up a bicameral board of directors. There were established four class A directors and three class B directors. Mrs. Bush and two persons acceptable to her formed the class B group. In order for the foundation to perform any of its charitable activities, a majority vote of each group was required. The effect was to give Mrs. Bush a veto power over the operation of the foundation.

The settlement agreement was submitted to and approved by order of the Minnesota Probate Court on August 30, 1966. The settlement was also approved by the state

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3. Among other things, the settlement agreement further provided that the executors would pay Mrs. Bush $2,100,000 to settle a dispute over a Florida property which the will had provided to Mrs. Bush as a residence for life "free of charge."

court in Florida since ancillary administration of the estate had been filed there.

The compromise and settlement did not last. The executors and directors engaged in activity which Mrs. Bush and the class B directors deemed improper. In January 1968 Mrs. Bush and the other class B directors brought an action in Ramsey County, Minnesota District Court. The complaint alleged that the case was brought by the class B directors in their representative capacity. A review of the complaint in the state court suit demonstrates that appellants fairly represent the prayer for relief when they state in their brief to this court:

> The court was asked in the [state court] Complaint to adjudge that The Bush Foundation *is* the residuary legatee, to enjoin acts of defendants designed to defeat distribution to The Bush Foundation, to remove the Class A Directors for their breaches of duty, and to remove the Executors of the husband's estate for their breaches of duty.

After three days of trial in September 1969, the state court suit was settled. Primarily, the settlement did away with the bicameral board of directors and replaced it with a unicameral board of 16 members, including Mrs. Bush. The settlement was approved by the Ramsey County, Minnesota court and final judgment was entered on April 10, 1970.[4]

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4. The judgment concluded in part:

* * * the above-entitled action, including all claims, counterclaims and cross-claims of or against the parties thereto (including but not limited to defendants Mary Jane Dickman and Herschel S. Arrowood) and against persons not parties hereto with respect to whom claims were asserted in or during the pendency of the action (including, but not limited to, David R. Roberts, Philip Stringer and Walter N. Trenerry) shall be and they are hereby dismissed with prejudice * * *.

On November 3, 1970, Mrs. Bush was adjudged incompetent by the Florida court. On December 2, 1971, the Florida court ordered that Mrs. Bush's executors continue to pursue those remedies which would vindicate Mrs. Bush's rights.[5] Hence, the instant law suit.

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5. We think it useful to set out the relevant portions of the Florida court's order:

* * * it is ORDERED AND ADJUDGED:

1. That the Co-Guardians of the Property of Edyth D. Bush, a/k/a Mrs. Archibald G. Bush, an Incompetent, are instructed, authorized and directed to commence, continue and pursue, by motions, complaints or other legal proceedings in the Probate and District Courts of the State of Minnesota or in any other appropriate tribunals or courts, such actions as may be appropriate and necessary to set aside and nullify the Decree and Judgment dated April 10, 1970 of the District Court, Second Judicial District, Minnesota, in *Bush, et al. v. Arrowood, et al.*, File No. 356691, and to set aside and nullify the Stipulation and Agreement dated September 17, 1969, and in connection therewith to secure an Order or Judgment that the said matter be again set down for trial so that the issues contained in the Complaint and pleadings therein, together with any amendments or supplements thereto, may be fully tried and the rights of Edyth D. Bush, individually, and as a Director of and on behalf of The Bush Foundation, be finally determined after a trial on the merits; and further to secure such declaratory orders, decrees, judgments or other relief as may be appropriate or necessary to adjudge and determine that the various agreements and promises made to the Ward on or about August 27, 1966, by the Co-Executors of the Estate of Archibald G. Bush, and also by The Bush Foundation, have been and are unperformed, violated, breached, ignored and rendered meaningless in major and material respects, so as to entitle the Ward to renounce the Last Will and Testament of her late husband Archibald G. Bush, and for such other relief as may be appropriate in connection with the foregoing matters and proceedings.

2. That the Co-Guardians of the Property herein are instructed, authorized and directed to litigate and defend in the Probate Court of Ramsey County, Minnesota, or in the District Courts of the State of Minnesota, or in any other appropriate courts or tribunals, any and all interests of the Ward as may be or become involved in the proceedings now pending or hereafter filed in the said Probate Court or in any other courts or tribunals to adjudge or declare that there has been no effective renunciation by the Ward of the Will of her late husband Archibald G. Bush and that she and her

(Continued on following page)

The complaint in the instant case sets out the facts and background leading up to this court action. Thereafter, decree is prayed for as follows:

> 1. That the Consent of Edyth D. Bush to the Last Will and Testament of Archibald G. Bush under date of April 21, 1965, was not fairly and reasonably obtained and is null and void and without force or effect.
>
> 2. Rescinding the agreement of settlement entered into on or about August 27, 1966, between Edyth D. Bush, as surviving spouse of Archibald G. Bush, the defendants Herschel S. Arrowood and Mary Jane Dickman, as Co-Executors of the Estate of Archibald G. Bush, and the defendant The Bush Foundation and determining that the plaintiff is entitled to renounce the Last Will and Testament of Archibald G. Bush.
>
> 3. Vacating and declaring void the Stipulation dated September 17, 1969, and the Judgment and Decree entered thereon on the 10th day of April, 1970, in the District Court of Ramsey County, Minnesota, in that certain action entitled Edyth Bush, etc., et al, Plaintiffs vs. Herschel S. Arrowood, etc., et al, being File No. 356691, and requiring the defendant The Bush Foundation and the members of its Board of Directors named as defendants herein to amend its Articles of Incorporation and its By-Laws so as to restore the bicameral principle of its Board of Directors.

Footnote Continued—

guardians have no further interest in the estate or its assets, with the purpose of sustaining and validating the renunciations heretofore filed by her or on her behalf on August 30, 1966 and on November 23, 1971 in the Probate Court of Ramsey County, Minnesota.

4. Vacating and setting aside the Interlocutory Decree Relative to Purported Renuciation of Will entered in the Probate Court of Ramsey County, Minnesota, on the 1st day of March, 1972, and requiring said Court to enter its Decree in accordance with the determination of this Court in the premises.

5. For an award of damages against such defendants, jointly and severally, in the sum of one hundred million dollars ($100,000,000.00), or such other amount as the Court and jury may determine.

We begin our analysis of this case with the observation that persuasive argument can be made that the federal court lacks jurisdiction in this matter.

Federal courts have no probate powers per se. This is true even when the requisite diversity of citizenship has been shown. *Kausch v. First Wichita National Bank of Wichita Falls, Texas,* 470 F.2d 1068, 1069 (CA5 1973). The federal courts do have jurisdiction

> * * * to entertain suits "in favor of creditors, legatees and heirs" and other claimants against a decedent's estate "to establish their claims" so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. *Markham v. Allen,* 326 U.S. 490, 494 (1946).

See also Warner v. First National Bank of Minneapolis, 236 F.2d 853, 858 (CA8 1956). Where the action is clearly in personam federal courts have the power to adjudicate the controversy. *Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 456, 466-67 (1939); *Harris v. Pollock,* 480 F.2d 42, 44 (CA10 1973); *Lamberg v. Callahan,* 455 F.2d 1213, 1216 (CA2 1972); *Starr v. Rupp,* 421 F.2d 999, 1004 (CA6

1970); *Wright, Federal Courts* §25 at 85 (1970). The test is easier to state than it is to apply. The differences are slight. As the court pointed out in *Starr v. Rupp, supra*:

> The cases thus endeavor to distinguish between direct interferences with or control of the res and adjudication of the rights of individuals who have an interest in the res. This line of distinction is not always clear. 421 F.2d at 1005.

The relief desired by the complaint in the instant case[6] would in substantial part seem to require interference with the prior jurisdiction of the Minnesota Probate Court and would in fact conflict with that court's decisions. *Compare Starr v. Rupp, supra,* 421 F.2d at 1006. Nevertheless, the allegations of the complaint are also grounded upon the fraud of the directors of the Bush Foundation in inducing Mrs. Bush to enter into the agreement of settlement in August 1966 and the stipulation dated September 17, 1969. These allegations would be cognizable outside the probate court and in fact were brought in the Ramsey County, Minnesota suit.

Where a claim is enforceable in a state court of general jurisdiction, the argument becomes more persuasive that federal diversity jurisdiction should be assumed. *Lamberg v. Callahan, supra,* 455 F.2d at 1216; *compare Lathan v. Edwards,* 121 F.2d 183, 184 (CA5 (1941).

The jurisdiction issue in this case is close. The district court, relying on the Minnesota case of *Bulau v. Bulau,* 294 N.W. 845 (Minn. 1940), determined that there were sufficient allegations to show the existence of jurisdiction. We agree that the *Pulau* case lends support to the proposi-

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6. We refer primarily to paragraphs 1, 2 and 4 of the complaint set out above.

tion that where the cause of action is based upon fraud the district court has jurisdiction to entertain the claim even though it affects probate matters.[7] Furthermore, because appellant relies heavily upon the allegation that the rights asserted in this suit are personal rights of Mrs. Bush, we think that jurisdiction lies in federal court under the authorities earlier cited.

Finding jurisdiction we turn to the question of whether the district court in the exercise of its discretion should have declined to entertain this suit. *See Markham v. Allen*, 326 U.S. 490, 495 (1945); *Burford v. Sun Oil Company*, 319 U.S. 315 (1943); *State Farm Mutual Automobile Insurance Company v. Bonwell*, 248 F.2d 862, 865 (CA8 1957).

Federal courts choose not to exercise their jurisdiction for numerous reasons. See cases cited in *Wright, Federal Courts* §52 (1970). One of those instances is when the federal court action would needlessly interfere with the state's administration of its own affairs. *Alabama Public Service Commission v. Southern Railroad Company*, 341 U.S. 341, 349 (1951); *Burford v. Sun Oil Company, supra; Tomiyasu v. Golden*, 358 F.2d 651, 655 (CA9 1966). We believe that the instant case presents a situation fitting the mold for abstention.

The area of probate and decedents' estates presents many varied problems. State courts deal with these problems daily and have developed an expertise which should discourage federal court intervention. These local prob-

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7. Since the Minnesota court held that the state district court had jurisdiction in a situation analogous to the instant case, the federal court here would have jurisdiction if diversity requisites are met.

We, of course, give deference to the district court's interpretation of local law. *Highway Construction Company v. Moses*, 483 F.2d 812, 814 n.2 (CA8 1973); *Owens v. Childrens Memorial Hosp.*, 480 F.2d 465, 467 (CA8 1973).

lems should be decided by state courts. *Cf. Magaziner v. Montemurs*, 468 F.2d 782, 787 (CA3 1972); *Downie v. Pritchard*, 309 F.2d 634, 636 (CA8 1962).

It would be improper for the federal courts to entertain a collateral attack on the judgments of the probate court or the district court in this case. As the district court recognized, the procedures for attacking these judgments are available to appellants in direct attacks upon those judgments for fraud or misrepresentation. *Pangalos v. Halpern*, 76 N.W.2d 702 (Minn. 1956); *Bulau v. Bulau*, *supra*. In addition, the Minnesota Supreme Court has pending before it an appeal from the Ramsey County, Minnesota District Court which appeal may resolve the issues in the instant case.[8] We should not interfere with that procedure. *Reichman v. Pittsburg National Bank*, 465 F.2d 16, 18 (CA3 1972); *Dreyfus v. First National Bank of Chicago*, 424 F.2d 1171, 1175 (CA7 1970).

We need not decide whether the personal rights of Mrs. Bush have been adjudicated and are therefore res judicata. The trial court felt that they were. The Minnesota district court in its memorandum and order, which is now on appeal to the Minnesota Supreme Court, indicates that the personal rights of Mrs. Bush have been adjudicated.[9] The Judgment and Decree in the state court settlement (April 10, 1970) also so indicates.[10] *See also Bush v. Arrowood*, 198 N.W.2d 263, 265 (Minn. 1972).

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8. In March of 1972 the Ramsey County Probate Court entered an order denying permission to the co-guardians of Mrs. Bush to file renunciation of the husband's will. The ruling was affirmed by the state district court. The case is now on appeal to the Minnesota Supreme Court. Appellants' legal and factual claims are substantially similar to the claims made in the instant case.

9. See note 8 *supra*.

10. See note 4 *supra*.

The Minnesota state courts are manifestly familiar with this litigation. The issues are intertwined with the probate and administration of the Bush estate. Whatever remedies appellants have can and should be pursued in the state courts. This case presents a situation where it is within the sound discretion of the federal district court to abstain.

Appellant argues that even if abstention is proper it was improper to dismiss. We disagree. Intervention of the federal courts is not necessary in this case for the protection of federal rights. *Alabama Public Service Commission, supra*, 341 U.S. at 349. Where, as here, the federal court abstains to avoid interference with state activities, and no federal interest requires retention of jurisdiction, dismissal is proper. If federal rights of any party are infringed, the normal state court review and certiorari to the United States Supreme Court are available. *Tomiyasu v. Golden, supra*, 358 F.2d at 655; *Wright, Federal Courts* §52 at 200 (1970); *see also Roy v. Jones*, 484 F.2d 96, 101 (CA3 1973) (Aldisert, Circuit Judge, concurring).

There remains the question of whether the district court's final judgment was proper. The court's memorandum and order clearly reflects that the dismissal was without prejudice to the bringing of the appropriate actions in state court. The judgment, however, dismissed the action on the merits. We have said that it is "inappropriate to make a determination on the merits while applying the abstention doctrine." *First American Bank & Trust Company v. Ellwein*, 474 F.2d 933, 936 (CA8 1973).

Accordingly, we affirm the decision of the district court solely upon the basis of abstention. We remand the case to the district court for the single purpose of modifying the judgment to reflect abstention as the basis for dismissal rather than a decision on the merits. *Ellwein, supra; Alabama Public Service Commission, supra.*

JUDGMENT IN COURT OF APPEALS

(July 8, 1974)

No. 73-1378

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

H. Clifford Lee, Clarence J. Bassler, Jr., and The Commercial Bank at Winter Park, Co-Executors of the Estate of Edyth Bush a/k/a Edyth D. Bush, a/k/a Mrs. A. G. Bush, deceased,

Appellants,

vs.

Herschel S. Arrowood, individually and as a co-executor under the last will and testament of Archibald G. Bush, deceased, and as a former director of The Bush Foundation; Mary Jane Dickman, individually and as a co-executor under the last will and testament of Archibald G. Bush, deceased; Cecil C. March, individually and as a director of The Bush Foundation; Elmer L. Anderson, individually and as a director of The Bush Foundation; Honorable Edward J. Devitt, individually and as a director of The Bush Foundation; Richard L. Post, individually and as a former director of The Bush Foundation; Reuel D. Harmon, individually and as a director of The Bush Foundation; The Bush Foundation, a Minnesota Non-Profit Corporation,

Appellees,

and

Thomas Malone, As Clerk of the Probate Court, Ramsey County, Minnesota; Joseph P. LaNasa, as Clerk of the Dis-

trict Court of Ramsey County, Minnesota; and Warren R. Spannaus, as Attorney General of the State of Minnesota.

Appeal from the United States District Court for the District of Minnesota.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Minnesota and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed, solely upon the basis of abstention.

And it is further ordered by this Court that this cause be and it is hereby remanded to the said District Court for proceedings in accordance with the opinion of this Court this day filed herein.

PETITION FOR REHEARING

(July 22, 1974)

No. 73-1378

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

H. CLIFFORD LEE, *et al.*,
Appellants,

vs.

HERSCHEL S. ARROWOOD, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA THIRD DIVISION

APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR CONSIDERATION EN BANC

Appellants, the Executors of the widow, petition for rehearing of this Court's decision (by Judges Gibson, Stephenson and Webster, with opinion by Judge Stephenson) announced July 8, 1974, and suggest the desirability of rehearing the matter *en banc.*

Rehearing should be granted because:

1. *The decision deals with half the case only;* it overlooks the balance which turns into clear error what is said in the opinion.

To see why this is so—and how it has come to pass that half the case is left dangling, undisposed of—it is important to recall that the cause of action asserted is that

the widow, in reliance upon the settlement with appellees (the Executors of her husband's estate and the Directors of The Bush Foundation), forbore filing the renunciation of her husband's will which she had signed. Once the period for filing the renunciation had passed, appellees began the series of maneuvers (spelled out in appellants' opening brief) to avoid carrying out the bargain they had made—the allegation is they never intended to carry it out. (R. 14.) The widow thereupon, *in her representative capacity* as a Director of her husband's foundation (and asserting no personal rights whatever), brought the state court proceedings referred to in this Court's opinion. Decisions in those actions, brought in her representative capacity on behalf of The Bush Foundation, of course *could not bind her personal rights*—and this Court does not suggest that they do.

The settlement having been repudiated, and the widow left holding the bag, the present action was brought *to assert the personal right* of the widow *either*:

1. To be restored to her right to renounce the Will; or,
2. To recover damages for breach of the settlement agreement—averred in the complaint to "exceed $100 million." (R. 17.)

The widow surely is entitled to the one—or the other. She cannot be tricked out of her right to renounce—and be then turned away at the courthouse door, as now has happened.

This Court has decided, correctly, that (p. 9) "jurisdiction lies in federal court" on the cause asserted, but incorrectly has held the widow may nevertheless be turned away—on abstention grounds—because exercise of federal jurisdiction:

1. "would in substantial part seem to require interference with the prior jurisdiction of the Minnesota Probate Court and would in fact conflict with that court's decision" (p. 8 of the Opinion), and
2. "It would be improper for the federal courts to entertain a collateral attack on the judgments of the probate court or the [state] district court in this case." (p. 10 of the Opinion.)

The reasons thus assigned dispose of the *first* branch of the widow's claim—to be restored to the right to renounce. Appellants, for reasons stated in the briefs, do not believe that is a correct decision. However, the Court has ruled; and appellants do not now reargue that point.

But, what about the *second* branch of the widow's claim?

She has been done out of her claim to a widow's share of her husband's estate. If *not* entitled to be restored to her right to renounce, *she clearly is entitled to damages.*

That claim is left unnoticed, unconsidered, undecided.

The subject is one that calls for re-examination.

If, however, what the Court has said is to be applied also to the money damage claim, then—

2. The Court has acted under serious misapprehension of the critical facts. The claim to damages:

1. *Does not,* as the Court mistakenly supposed, "require interference with the prior jurisdiction of the Minnesota Probate Court" (Opinion, p. 8);
2. *Does not,* as the Court mistakenly supposed, "conflict with that [Minnesota] court's decisions" (Opinion, p. 8);
3. *Does not,* as the Court mistakenly supposed, constitute "a collateral attack" on the state court judgments. (Opinion, p. 10.)

These are misunderstandings on which the Court's decision rests.

The claim for damages for breach of the contract of settlement was *not* involved in *any* prior proceeding. The damage claim is brought for the first time in this suit. The earlier proceedings involved the widow only in her representative capacity as a Director of the Bush Foundation. The claim for damages therefore does *not* in any way interfere with the jurisdiction of the Minnesota courts, does *not* in any way rest upon a challenge to, or attempt to set aside, *any* state court judgment heretofore entered. To the contrary, it is *those judgments* that *establish the breach of the settlement contract and the consequent right to damages.*

This Court disposed of the matter by saying (p. 10) the widow's Executors can challenge the judgments by "direct attacks upon those judgments for fraud or misrepresentation" pursuant to the Minnesota statutes.

But appellants do *not*—most emphatically they do not —on the damage claim, attack those judgments. *Those judgments establish the breach of the settlement agreement.*

The widow's Executors, on the damage claim, do *not* attack *any* judgment. They *accept* those judgments as establishing the claim for damages. Indeed, when, on the oral argument before this Court, this very question was raised, appellants made clear—as they thought "beyond peradventure"—that they do *not* attack any judgment entered in *any* proceeding—save only the judgment from which this appeal comes. To the contrary, appellants asserted unequivocally that they accept, embrace, abide by *every* judgment heretofore entered in every proceeding involving this estate, including the judgment now on appeal to the Supreme Court of Minnesota—save only the federal court judgment here appealed from.

The damage claim for breach of contract presents nothing within "an expertise" developed in the state courts (p. 10 of the Opinion); the Court has mistakenly assigned this "expertise" as a further reason to abstain from exercise of the jurisdiction the federal court clearly has. In dealing with claims of breach of contract federal courts enjoy as much "expertise" as state courts.

The decision rests on misunderstanding.

The case should be reheard.

3. In no event should the case have been dismissed. To dismiss may result in irremediable loss to the widow's estate. The pending proceeding before the Minnesota Supreme Court, to which the Court refers (p. 10 of the Opinion) does not involve the issue of damages; it turns on the question whether the late-filed renunciation—filed after the breach occurred—is valid. This Court said (Opinion, p. 10) "We should not interfere with that procedure [*i.e.*, the appeal to the Minnesota Supreme Court]."

The legal fact is that whatever this Court decides will *not*—not in the slightest—interfere with the procedure or judgment in the Minnesota Supreme Court. The questions there and the questions here (on the widow's claim for damages for breach of the settlement contract) are entirely separate, independent, and different. The one does not affect the other. If the Supreme Court of Minnesota rejects the renunciation that will not affect the case for damages—except to emphasize the need for it.

But this Court's outright dismissal of the action is contrary to the cases holding a litigant who satisfies the jurisdictional requirements is entitled to have his case adjudicated in federal court, and is contrary to the cases where courts have been directed to hold the federal suit on the docket pending completion of proceedings in state court. In addition, this Court's decision can cause serious

damage to the widow's estate and the widow's Foundation that will receive her substantial property. To compel the widow's estate to begin a new action will expose it to hazards the estate should not be asked to run—as, for example, a statute of limitations defense, and others. Appellees have already demonstrated imagination and ingenuity in posing defenses, and a willingness to assert them to defeat the widow. Opportunity to nourish new ones should not be provided. The widow's estate has a clear federal right—if abstention is to apply—to have this case held on the docket.

The need for rehearing is real.

The damage claim for breach of the settlement contract the widow is entitled to have considered and decided —by this Court.

Rehearing should be granted.

Respectfuly submited,

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July 18, 1974

ORDER DENYING REHEARING

(August 13, 1974)

No. 73-1378

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

H. CLIFFORD LEE, *et al*,
Appellants,

vs.

HERSCHEL S. ARROWOOD, *etc.*, *et al*,
Appellees.

Appeal from the United States District Court
for the District of Minnesota.

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

COURT, U. S.
DEC 4 1974

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-551

H. CLIFFORD LEE, *et al.*,

Petitioners,

vs.

HERSCHEL S. ARROWOOD, *et al.*,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORIAI

To The United States Court of Appeals
For the Eighth Circuit
On Behalf of The Bush Foundation,
A Minnesota Nonprofit Corporation,
Cecil C. March, Reuel D. Harmon,
Elmer L. Andersen and
Richard L. Post

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-551

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of Edyth Bush, a k a Edyth D. Bush, a k a Mrs. A. G. Bush, deceased,

Petitioners,

vs.

HERSCHEL S. ARROWOOD, individually and as a Co-Executor under the Last Will and Testament of Archibald G. Bush, deceased, and as a former director of The Bush Foundation; MARY JANE DICKMAN, individually and as a Co-Executor under the Last Will and Testament of Archibald G. Bush, deceased; CECIL C. MARCH, individually and as a director of The Bush Foundation; ELMER L. ANDERSEN, individually and as a director of The Bush Foundation; Honorable EDWARD J. DEVITT, individually and as a director of The Bush Foundation; RICHARD L. POST, individually and as a former director of The Bush Foundation; REUEL D. HARMON, individually and as a director of The Bush Foundation; THE BUSH FOUNDATION, a Minnesota Non-Profit Corporation, THOMAS MALONE, as Clerk of the Probate Court, Ramsey County, Minnesota; JOSEPH P. LA NASA, as Clerk of the District Court of Ramsey County, Minnesota; and WARREN R. SPANNAUS, as Attorney General of the State of Minnesota,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORIAI

To The United States Court of Appeals
For the Eighth Circuit
On Behalf of The Bush Foundation,
A Minnesota Nonprofit Corporation,
Cecil C. March, Reuel D. Harmon,
Elmer L. Andersen and
Richard L. Post

I. THE CASE IS MOOT

The opinion of the Court of Appeals states:

> "In addition, the Minnesota Supreme Court has pending before it an appeal from the Ramsey County, Minnesota District Court which appeal may resolve the issues in the instant case.[*] We should not interfere with that procedure. *Reichman v. Pittsburg National Bank*, 465 F.2d 16, 18 (CA3 1972); *Dreyfus v. First National Bank of Chicago*, 424 F.2d 1171, 1175 (CA7 1970).

On November 22, 1974, the Supreme Court of Minnesota filed its decision (the Minnesota decision) the full text of which is printed herewith commencing at page A-3 herein.

Respondents submit that all issues attempted to be raised by the Petition herein have been finally and conclusively settled by the Minnesota decision and that this case is now moot.

The following materials are presented as a guide to an understanding of the Minnesota decision and its impact upon this case.

---

[*] In March of 1972 the Ramsey County Probate Court entered an order denying permission to the co-guardians of Mrs. Bush to file renunciation of the husband's will. The ruling was affirmed by the state district court. The case is now on appeal to the Minnesota Supreme Court. Appellants' legal and factual claims are substantially similar to the claims made in the instant case."

II. STATEMENT OF THE CASE

Rather than engaging in an elaborate demonstration of the serious deficiencies in Petitioners' "Statement of Case," we respectfully direct attention to the objective review of the operative facts contained in the Minnesota decision by its adoption of the Minnesota Trial Court's opinion. See pages A-5 to A-20 herein.

The salient facts can be summarized as follows:

(1) A. G. Bush died January 16, 1966. He was then age 79. His widow was age 88. They were childless.

(2) His will, after specific bequests, left his entire estate to The Bush Foundation. Appended to the will was the written consent of the widow, Edyth Bush, to the terms of the will and waiver of her rights to a widow's statutory share. The will and widow's consent were witnessed by the lawyer for both Bush and his widow and two other lawyers of impeccable credentials.

(3) At the time of his death, the inventory value of A. G. Bush's estate as approximately $130,000,000.

(4) At the time of the death of his widow in 1972, the inventory value of her estate was approximately $130,000,000.[1]

(5) Shortly after the death of Bush, the controversies described on pages A-6 to A-18 herein erupted. Those were settled by the payment to the widow of $2,100,000 in consideration for a lengthy set of agreements by her (see pp. 100-104, Record, CCA Appendix, Vol. I). Although not mentioned in the document of Compromise and Settlement, the parties apparently also agreed to the creation of a "bicameral board of directors" for the Foundation to consist of four "A" directors

[1] To date no one has claimed that any significant portion of the widow's funds came from any source other than inter vivos transfers to her by her husband

and three "B" directors. The latter were Mrs. Bush and two persons known to be "loyal" to her: a lawyer, H. C. Lee; and her nephew, C. J. Bassler, Jr. All actions of the board of The Bush Foundation required the concurrence of a majority of each class of directors, voting separately as classes. It was this bicameral arrangement to which Petitioners refer as Mrs. Bush's "veto."[2] (Pet. 6).

(6) In the litigation described at pages A-10 to A-14 herein, it was charged by the "A" Directors and the Attorney General of Minnesota that the bicameral structure was contrary to public policy, illegal, and void. (Record, CCA Appendix Vol. II, pp. 448-51, 467). The parties defendant other than the Attorney General, also demanded that Mrs. Bush disgorge the $2,100,000 she had extracted in settlement.

(7) The Decree and Judgment of the Ramsey County District Court, entered upon a stipulation signed by attorneys for all of the parties, decided, among other things:

(a) Mrs. Bush was entitled to keep the $2,100,000

(b) The bicameral board of seven members should be replaced by a board of sixteen members consisting of twelve members elected at large, a lifetime member (Mrs. Bush) and three "Bush family members."[3]

(8) Mrs. Bush was adjudged an incompetent in November, 1970, by the County Court, Orange County, Florida.

---

[2] The claim of veto necessarily assumes the concurrence of either Bassler or Lee with the widow's wishes on all subjects regardless of their own views or their duties as directors of a charitable foundation.

[3] Only one of whom, Clarence J. Bassler, Jr. was in any way by blood or marriage related to anyone named Bush.

III. NATURE OF THIS PROCEEDING

The case at bar was commenced in April, 1972 in the name of Edyth D. Bush by the guardians of her property. Edyth Bush died November 20, 1972 and H. Clifford Lee, Clarence J. Bassler, Jr. and the Commercial Bank at Winter Park, Florida, co-executors of her estate, were substituted as parties plaintiff. By this action [the pleadings appear at Record, CCA Appendix, Vol. I, pp. 10-37], the plaintiff asked the District Court to:

> "(1) declare void her written consent to the Will of her husband, Archibald G. Bush, dated April 21, 1965;
>
> (2) rescind the agreement of settlement dated August 27, 1966, between Edyth D. Bush, as surviving spouse of A. G. Bush, the co-executors of the estate of A. G. Bush, and The Bush Foundation, and determine that Edyth Bush is entitled to renounce the Will of A. G. Bush;
>
> (3) vacate and declare void the stipulation dated September 17, 1969, and the judgment and decree entered thereon on April 10, 1970, in the District Court of Ramsey County, Minnesota, in the action entitled Edyth Bush, etc., et al, plaintiffs, vs. Arrowood, etc., et al, being File 356691 (hereinafter the "Ramsey County Action"), and requiring the defendant, The Bush Foundation to amend its Articles and its By-Laws so as to restore a bicameral Board of Directors;
>
> (4) vacate and set aside the decree of the Probate court of Ramsey County, Minnesota of March 1, 1972 denying Edyth Bush's claim to renounce;
>
> (5) award damages against the defendants in the sum of $100,000,000."

IV. THE MINNESOTA COURT PROCEEDING

On October 12, 1971 (five and one-half years after Mr. Bush's death) the co-guardians of the property of Edyth Bush filed with the Probate Court of Ramsey County, Minnesota, a purported renunciation of the will of Archibald G. Bush.

The claim asserted on behalf of the then incompetent widow was that she had not been fully advised of the nature and extent of her rights and of her husband's property at the time she executed the consent to his will; the consent was therefore void and she was entitled to elect to take a widow's statutory share.

By Minnesota law (M.S. §525.212) a surviving spouse who has not otherwise consented is entitled to file a document of renunciation in the Probate Court within six months after the commencement of probate or such longer time as may be authorized "for good cause shown." The Probate Court of Ramsey County refused to give effect to the attempted renunciation and confirmed the determination theretofore made in a number of orders of the Court that The Bush Foundation was the sole residuary beneficiary of the estate of A. G. Bush.

The executors of her estate appealed to the District Court of Ramsey County. That Court affirmed. They appealed to the Supreme Court of Minnesota which issued the opinion reproduced herein.

V. ISSUE OF RES JUDICATA

As noted, the Judgment and Decree of the Ramsey County District Court [Record, CCA Appendix Vol. I, pp. 237-43] decided, among other things, that Mrs. Bush was entitled to retain the $2,100,000 "paid * * * in consideration of her execution of the Settlement Agreement of August 27, 1966 * * * *and the waiver by her of any right to renounce the will of Archibald G. Bush* * * *" and that the board of the Foundation should be changed from a seven-man bicameral board to a sixteen-member board. (Emphasis added.)

One of the defenses of all defendants interposed in the answers to the case at bar was that the Judgment and Decree referred to was *res judicata* as to all matters attempted to be raised in the instant case.

Similarly, in response to the co-executors' pleadings in the Ramsey County Action upon which the Minnesota decision printed herein is based, it was asserted that the Judgment and Decree of 1970 were *res judicata* on the question of the right of Mrs. Bush to void her written consent to her husband's will.

A. Decision of the Trial Court.

The decision of the Honorable William G. Juergens (A 58-75) clearly held that petitioners' claims were foreclosed by *res judicata.*

B. Petitioners' Postion on Res Judicata.

Petitioners here have consistently claimed that the Judgment and Decree of April, 1970 was not *res judicata* as to Mrs. Bush for, principally, the following reasons:

(a) They asserted that she was not a party, individually, in the Ramsey County action;

(b) They asserted that she never consented to the stipulation upon which the judgment was based and that therefore the judgment was not binding upon her;

(c) They assert that the claim which she now makes was not adjudicated.

VI. ISSUE PRESENTED TO SUPREME COURT OF MINNESOTA

The issue presented to the Supreme Court of Minnesota, stated in its narrowest possible terms, was simply whether the Probate Court of Ramsey County, Minnesota, correctly refused to extend by more than five years the time within which a widow would be permitted to file a purported disavowal of her written consent to her husband's will. Petitioners hint (Pet. 5, 6) that the widow had the simple right of election to take a statutory share. In fact, the most she ever could have had was the right to litigate in the Probate Court the validity of her written waiver of her statutory right and consent to her husband's will.

In view of the dreary chronicle of litigation surrounding the estate of A. G. Bush (all of which, as indicated in the Minnesota Decision, was generated by persons whose interests must be suspect since Mrs. Bush could not possibly exercise the

rights which are now asserted to be at issue),* the Supreme Court of Minnesota must have suspected that a decision upon so narrow a ground would merely trigger a mass of additional litigation. However that may be, the Court obviously rejected this possible narrow ground and attempted to lay all controversies between the widow and her representatives on the one hand, the estate of A. G. Bush and The Bush Foundation on the other hand, finally at rest.

VII. POSTURE OF PETITIONERS' CLAIMS

In an effort to avoid the *res judicata* effect of the 1970 judgment the petitioners here assert (Petition, page 9).

> "The state court judgment, as a matter of law, could not operate as res judicata because:
>
> 1. A judgment in an action brought in a representative capacity, as was the state court suit, cannot bind *the personal rights* of the representative;
> 2. The widow *did not consent* to the stipulation or judgment which was signed by counsel who did not purport to bind the widow's personal rights, and could not, because under Minnesota law counsel is without authority to settle his client's case, or, for that matter, even to enter the client's appearance;
> 3. The widow, prior to the time the state court judgment was entered *was disabled, and had been for more than a year*, by a massive stroke from which she never recovered, for which the Florida court was to adjudge her incompetent and appoint guardians for her."

---

* If we are to believe petitioners, Mrs. Bush, then aged 90, probably could not have exercised them after 1968 (Pet. 9, item 3).

As to *1*, the Minnesota decision (p. A-23 herein) makes it abundantly clear that Mrs. Bush was present, personally, in the Ramsey County action; her personal rights were adjudicated; the judgment is binding upon her and her representatives. It cannot be seriously asserted that any interest, whatever it may have been, in the structure of The Bush Foundation, was not litigated, settled and disposed of by the same judgment.

As to *2*, the implications are (a) again, her lack of personal presence in the Ramsey County Action and (b) lack of authority on the party of her lawyers. No reiteration is warranted as to (a). The Supreme Court of Minnesota considered (b) unworthy of serious consideration. It said (pp. A-27-28 herein):

> "The only other contention that merits discussion is the claim now made that Mrs. Bush did not authorize or consent to the settlement upon which the Godfrey judgment was based. We need not spend time on that issue. That she was represented by competent counsel must be conceded. That she knew what she was doing must likewise be conceded.
>
> "On a motion for summary judgment we have held on many occasions that a party opposing such motion must do something more than simply rely upon the pleadings. Here there is nothing submitted, by form of affidavit or otherwise except mere conclusionary opinion, to show that the settlement was not made with Mrs. Bush's full consent. Rosvall v. Provost, 279 Minn. 119, 155 N. W. 2d 900 (1968); Ahlm v. Rooney, 274 Minn. 259, 143 N. W. 2d 65 (1966). It is also evident that Mrs. Bush was kept apprised of what was being done and of the action taken in her behalf by her attorneys. Whether or not she consented to the stipulation is a question of fact. The Godfrey court

> having determined that issue adversely to her, and no appeal having ever been taken from that determination, she is clearly now bound by it."

As to *3*, it is either fully laid to rest by the language just quoted or it represents a plea to this Court to determine on counsel's fiat that Edyth Bush was factually incompetent before she was adjudicated legally incompetent despite a record void of any suggestion that the court before which she was then litigating was notified of that claim and devoid of any effort by appropriate proceeding after judgment to call the same to the court's attention pursuant to Rule 60.02* Minnesota Rules of Civil Procedure.

VIII. THE ISSUE OF ABSTENTION

The decision of the Court of Appeals wisely decided that questions intimately related to state court proceedings were best left to determinations theretofore and, perhaps, thereafter to be made. It did not, however, find that there was anything wrong with the decision of the District Court on the merits, nor suggest any infirmity in any of the other defenses asserted to be conclusive against the claims of Mrs. Bush. It is now conclusively determined that the decision by the trial court was in all respects correct.

Assuming, *arguendo*, that a plausible argument could be made, that until the last word had been spoken in state courts, stay and not dismissal was the appropriate course, the issue is moot. We need not trouble this Court with the easy demonstration that nothing in *United States v. Michigan National Corporation*, —— U.S. ——, No. 73-1737 (1974) required a stay.

---

* In all essentials the equivalent of Rule 60(b), F.R.C.P.

There is nothing to stay. The Supreme Court of Minnesota, treating only with state law claims, totally devoid of any federal questions, has conclusively disposed of the matter. This Court should not even be requested to engage in the futile gesture of a direction to the lower courts to enter two useless simultaneous orders: one of stay; the other of dismissal on the merits.

It is theoretically true that petitioners here have a right to petition the Supreme Court of Minnesota for a rehearing. That Court's reference (pp. A-25-27 herein) to the fact that it had previously said that the 1970 Judgment was *res judicata* on the claims here asserted, and now has said it again, is ample warrant that no such petition will be viewed with favor.

IX. JURISDICTION

Rule 19 of the rules of this Court indicates the general considerations applicable to evaluation of the petition. The claim (Pet. p. 11-14) that this case fits the rule is thin at best.

Petitioners' view on abstention is palpably wrong and is, in addition, indisputably irrelevant.

The artful claim of denial of due process, based as it is on the demonstrably false premises that the Ramsey County Action did not bind Mrs. Bush personally and did not involve precisely the issue of corporate form, is annihilated.

There is nothing left for decision by this, or any, Court.

CONCLUSION

The manner in which the widow, down to her last $130 million has been "done out of her widow's claim . . ." (Pet. 14) to repudiate her written consent to her husband's will, which was prepared by, and witnessed by, the same lawyer who then and to the date of her death was also *her* lawyer, needs no more "ventilation." It has been hyperventilated in an array of judicial proceedings starting in 1966 in probate, state district, federal, and state supreme courts, all, unfortunately, at the great expenditure of funds for endless litigation which the decedent hoped could, and which now can, be devoted to the charitable purposes which he prescribed.

The petition should not be entertained.

Respectfully submitted,

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APPENDIX

Decision of Supreme Court
of Minnesota
(November 22, 1974)

No. 200 — Ramsey County
Knutson, J. Took no part, Sheran, C. J. Otis, J.
Endorsed. Filed November 22, 1974
John McCarthy, Clerk, Minnesota Supreme Court

In re ESTATE OF ARCHIBALD G. BUSH,
a.k.a A. G. BUSH, Decedent.

H. CLIFFORD LEE, *et al.*, Co-Executors of the
ESTATE OF EDYTH D. BUSH, Deceased,

Appellants,

44707 vs.

HERSCHEL S. ARROWOOD and MARY JANE DICKMAN,
as Executors of the Estate of ARCHIBALD G. BUSH,
Deceased,

Respondents,

THE BUSH FOUNDATION,

Respondent,

WARREN SPANNAUS, Attorney General of the
State of Minnesota,

Respondent.

SYLLABUS

1. A judgment entered by the district court pursuant to a stipulation for settlement of an action involving the administration of a charitable foundation, to which judgment all parties agreed and in which the personal rights of the widow of the testator who bequeathed to the foundation all the residue of his estate, as well as disputes relating to management of the foundation and the administration of the husband's estate,

are resolved, is res judicata as to all matters covered by the judgment.

2. A district court in the determination of an appeal from probate court pursuant to Minn. St. 525.72 may grant summary judgment where there are no issues of fact that can be litigated.

Affirmed.

Considered and decided by the court en banc.

OPINION

KNUTSON, J.*

This is an appeal from a judgment entered in the District Court of Ramsey County granting summary judgment to defendants and dismissing an appeal from an interlocutory decree of the Probate Court of Ramsey County declaring that Mrs. Bush's purported renunciation of her husband's will was of no force and effect.

The case is the culmination of much protracted litigation and many legal skirmishes resulting from the probate and settlement of the will of Archibald G. Bush. The facts and legal maneuvers of the interested parties are so involved that it seems best to relate them in considerable detail even at the risk of an unduly lengthy opinion in the hope that the decision we now make may see an end to this protracted and expensive litigation.

The trial court has set forth in detail in his memorandum decision the facts essential to a determination of the issues now before us. We doubt that we could improve upon them. So, we adopt as the facts in this decision that portion of the court's memorandum decision that is relevant to the issues involved. We quote and adopt the following from that decision.

* Retired Chief Justice acting pursuant to Minn. St. 2.724.

"The will of Archibald G. Bush, made April 21, 1965, designated The Bush Foundation as the residuary beneficiary of his estate, with the limitation that, if it be unable to take 'or if bequests to it be not deductible for Federal estate tax purposes', the residue would go to the A. G. Bush Institute. It further provided that, if neither the Foundation nor the Institute be able to take or 'if bequests to them be not deductible for Federal estate tax purposes', the executors should organize a non-profit corporation to which the residue would go instead.

"Mr. Bush, in his Will, expressly made no provision for his wife, Edyth Bush, because it recited they had 'agreed' that the form of 'testamentary plans' 'set out in this agreement is the most suitable.' Attached to the Will is a 'consent of spouse' of the same date, signed by Edyth Bush, which states that she had read the Will and understood its content that she ratified and consented 'to all dispositions made in it' and that she understood that the law gives her 'a much greater interest' than provided in it.

"Both the Will and the consent were witnessed by persons whom the Court regards to be highly competent lawyers. They were Walter N. Trenerry, Philip Stringer and David R. Roberts.

"The Court understands from the file that both Mr. and Mrs. Bush had previously contributed to The Bush Foundation. The Will gave no direction as to how The Foundation must be operated. It indicated only that it must be able to take and that the donor's bequests to it be 'deductible for Federal estate tax purposes'. And it suggested the thought that whatever corporation might be formed to take be 'operated exclusively for religious,

charitable, scientific, literary or educational purposes, including the encouragement of art'.

"The Will specifically gave Mr. Bush's Florida house to the Foundation along with a proviso that Mrs. Bush could occupy the premises so long as she might wish without charge. Mr. Bush died at Winter Haven, Florida, on January 16, 1966. His estate has been in probate in Ramsey County District Court in Minnesota since early after that. It has been a subject of controversy almost from the beginning of the probate.

"Notwithstanding her consent attached to the Will, Edyth Bush, after Mr. Bush had died, indicated an intention to renounce the Will's provisions. Under date of August 27, 1966, she entered into an agreement of compromise and settlement of that issue with the executors. Her claim as stated in the written agreement was that 'she was not informed of the contents of the said Will, of the extent, nature or character of her husband's estate, of the provisions made for her in the said Will, nor of her statutory rights as the surviving spouse of her said husband'.

"In the compromise agreement, Edyth Bush was to be paid $2,100,000; all the outstanding stock of Bush Management Company was to be sold to her for $250,000; the services of David R. Roberts, and Walter N. Trenerry as counsel for the executors and of H. C. Lee and Philip Stringer as their special counsel would be retained, and a prompt petition would be made to the Ramsey County Probate Court and the County Court of Orange County, Florida, for approval.

"Mrs. Bush in turn agreed in the stipulation of settlement that she had been fully advised by Bernard E.

Epton, an attorney of hers in Chicago, of the nature and extent of her husband's estate which would likely exceed $130,000,000, of the provision in the Will giving her a life interest in the Florida home, and of her right under the Minnesota and Florida statutes to renounce her late husband's Will and take half of the estate which would amount to approximately $66,000,000. She further agreed to waive any right to renunciation of the Will and that she confirmed and approved her consent attached to the Will. The instrument stated, in effect, that it had to be approved by the Court to be valid. It was signed by Mrs. Bush and by the executors of the Estate.

"The agreement of compromise was approved by the Probate Court of Ramsey County on August 30, 1966, and by the Orange County, Florida, County Court on September 7, 1966.[1]

"It is to be observed that that agreement contained no mention as to how the Foundation must be operated. The Foundation did agree to provide for two classes of directors. It amended its Articles of Incorporation and By-Laws, accordingly, to provide for the two classes of member-directors and, in effect, that all action of the Foundation 'should thereafter be exercised exclusively by a majority vote of each of the two classes of directors on a bicameral basis.' (The appellants' propositions of law and fact on this appeal state that the Foundation and the executors agreed to 'be guided by the wisdom and leadership of Mrs. Bush' and to submit to her all requests for gifts or grants.)

"Subsequently, in June of 1967, petition was made to the Ramsey County Probate Court for partial distribution

[1] Ancillary proceedings were pending in Florida.

from the Estate to the Foundation. *Mrs. Bush was one of the petitioners;*[2] and she stated in the document that she was petitioning as the surviving spouse and sole heir of the decedent, as a legatee under his Last Will and Testament, and as a member, Class B director and Chairman of the Board of Directors of The Bush Foundation. Other petitioners were Clarence J. Bassler, Jr., and H. Clifford Lee, as members and Class B directors of the Foundation, and The Bush Foundation itself. The petition recited that it was filed because the representatives had failed to move expeditiously to close the estate. Attorneys for the petitioners were the firm of Oppenheimer, Hodgson, Brown, Wolff and Leach by Benno F. Wolff, Esquire.

"Supporting that petition was a memorandum in favor of the partial distribution, which was submitted by attorneys Benno F. Wolff, Esquire, and David C. Donnelly, Esquire, and Messrs. Oppenheimer, Hodgson, Brown, Wolff and Leach, all of St. Paul and by Theodore C. Diller, Esquire, and Thomas P. Healy, Esquire, and Messrs Lord, Bissell & Brook, of Chicago. The memorandum recites in part:

'Even if her expired renunciation rights are restorable, which by now the Court must doubt, we now state unequivocally, as we did on oral argument: Mrs. Bush is interested in the entire residue of her husband's estate becoming vested in The Bush Foundation, and not otherwise. She asks the Court to make no reservation on her account.'

"Referring to a Ramsey County District Court action by the Class B against the Class A directors of the Foundation, the memorandum continued:

---

[2] Italics supplied.

'The District Court action may involve litigation concerning the corporate structure of the Foundation, but that is not within the jurisdiction or concern of the Probate Court. The residuary bequest having vested in The Bush Foundation as of the date of Mrs. Bush's death, the internal affairs of the Foundation subsequent to that date, though they may become the subject of District Court litigation * * * are not an impediment to the entry of a partial decree * * *.'

The memorandum added:

'* * * the situation in the estate, in the light of the indicated items remaining to be attended to by the executors, is such that there is no plausible reason for delaying the entry of a decree assigning to The Bush Foundation the substantial residue on hand, less only the reserve aforementioned.'

"On March 22, 1968, the Probate Court issued its partial decree of distribution, and set forth that the estate had been substantially administered, that the portion of the residue then available for distribution was of the inventoried value of $45,761,161.03 consisting of Minnesota Mining and Manufacturing Company stock. That Court thereupon decreed that this property be 'hereby assigned to and vested in The Bush Foundation'. The Court file indicates that the Foundation did in fact receive this portion of the estate.

"Two factors in controversy appear patent in the District Court file. One is that Mrs. Bush wanted The Bush Foundation operated as she felt her husband may have wanted it to be run. Another is that the Estate of Archibald G. Bush has not been closed with any expeditiousness although she had been promised that it would be. Counsel

on both sides in the present controversy have brought out that the combined properties of both Mr. and Mrs. Bush approximate a quarter of a billion dollars.

"The estate most certainly has been long in administration. Should it be necessary for this matter to go to trial, one of the fact issues will be whether the delay has been in the actual administration or whether it has been caused by the quantity of litigation in which it has been embroiled.

"The instant District Court file further reveals a trust instrument dated September 8, 1967, between Mrs. Bush as grantor and David R. Roberts, H. Clifford Lee and Mrs. Bush herself as trustees setting aside a fund 'to pay expenses, legal fees, and all other costs * * * of continuing, prosecuting and defending to a successful conclusion or settlement' of various proceedings and litigation 'for the benefit of The Bush Foundation, the benefit of her late husband's estate plans and charitable purposes, and her own benefit or defense.' The instrument further suggests 'the prosecution or defense of additional actions, lawsuits, appeals or other proceedings' in the future. The affidavit of Neil P. Convery attached to the copy of the trust instrument in the file states that the trust res consisted of shares of Minnesota Mining and Manufacturing Company stock having a present value of approximately $1,000,000.

"David R. Roberts is the identical name that appears as a witness to the Last Will and Testament of Archibald G. Bush and to the ratification and consent thereto by Edyth Bush.

"A lawsuit was commenced in Ramsey County District Court, the Complaint being dated January 11, 1968.

(Edyth Bush, as a member, a director and chairman of the board of directors of The Bush Foundation; Clarence J. Bassler, Jr., as a member and a director of The Bush Foundation; and H. Clifford Lee, as a member and a director of The Bush Foundation, in their representative capacities aforementioned and on behalf of The Bush Foundation (a Minnesota non-profit corporation), Plaintiffs, vs. Herschel S. Arrowood, individually and as a co-executor under the last will and testament of Archibald G. Bush, deceased, and as a member, a director and treasurer of The Bush Foundation; Mary Jane Dickman, individually and as co-executor under the last will and testament of Archibald G. Bush, deceased; Cecil C. March, individually and as a member, a director and president of The Bush Foundation; Richard L. Post, individually and as a member, a director and secretary of The Bush Foundation; Honorable Edward J. Devitt, as a member and a director of The Bush Foundation; and Honorable Douglas M. Head, as Attorney General of the State of Minnesota, Defendants—Ramsey County District Court File 356691.)

"The Complaint recited that Edyth Bush was the widow of Archibald G. Bush. It complained that the defendants, except Judge Devitt, who was a new A director, and the attorney general had combined in breach of their fiduciary duties to delay distribution to the Foundation; and that all claims had been paid and all estate and inheritance taxes and expenses of administration had been either paid or reserved for payment, and that the year period for probate (M. S. 524.47) had expired without obtaining an extension of time from the Probate Court. The Complaint set forth what plaintiffs regarded as ef-

forts of the executors to thwart distribution to the Foundation and the fact that they had obtained from that Court an order that referred to the Foundation as 'a contingent residuary legatee'. The matter, it indicated, had come before the directors to get rid of the word 'contingent'. The B directors were unanimous that efforts be taken to eliminate the word. The A directors, other than Judge Devitt who was new to the board, voted unanimously against it, the Complaint stated; the A directors expressed doubt that the Foundation could take and indicated that subsequent events might make the Foundation unable to take. The A directors refused to appeal from the Probate Court orders, and so *Edyth Bush individually*[3] and the B members did. The A directors other than Judge Devitt attacked the petition for partial distribution, according to the allegations.

"The file in that lawsuit is replete with motions and discovery, but the case ended first in a number of days of trial and then in settlement. Question had been raised as to the legality of having A and B directors. Now it was agreed:

"1. The Board would consist of 16 directors so long as Mrs. Bush lived. Thereafter there would be 15.

"2. She would be a lifetime director and chairman of the board. There would be a class of 3 Bush family directors, consisting initially of C. J. Bassler, Jr., H. Clifford Lee and one other to be designated by them subject to approval by the Attorney General.

"4. The other 12 would be Cecil C. March, Judge Devitt, Elmer L. Andersen, Reuel D. Harmon and 8 others to be selected.

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[3] Italics supplied.

"5. Terms would be 3 years.

"6. Other than Mrs. Bush, nobody would be eligible for election after age 70.

"7. The Foundation would adopt a by-law disqualifying later members for election affiliated with a corporation whose stock or securities constitutes 5% or more in value of the Foundation's portfolio.

"8. Vacancies other than in family directorships would be filled by a vote of not less than 8 directors at a duly-called meeting.

"9. A quorum to do business would be 9.

"10. A president shall not be eligible for reelection after serving for 3 years.

"11. The board would determine voting the shares in the portfolio.

"12. 'There shall be no recovery of the $2,100,000 paid to Mrs. A. G. Bush in consideration of her execution of the Settlement Agreement and payment have been approved * * * by the Probate Court * * *.'

"15. 'The Court may award the sum of $50,000 to the plaintiff "B" directors and the sum of $50,000 to the defendant "A" directors * * * as allowances for attorney fees, costs, disbursements and expenses in this litigation * * * and * * * the decree * * * shall provide that payment thereof constitutes satisfaction in full to the parties mentioned. * * *.'

"20. 'The executors agree to take prompt action * * * to procure entry of a final decree in the Probate Court assigning the residue of the estate of Archibald G. Bush to The Bush Foundation.'

"The stipulation of settlement, being dated September 17, 1969, was signed by obviously competent counsel as follows:

"For the plaintiffs—Messrs Oppenheimer, Hodgson, Brown, Wolff and Leach by Benno F. Wolff, Esquire, and David C. Donnelly, Esquire, of St. Paul, and Messrs Lord, Bissell & Brook by Theodore C. Diller, Esquire, and Thomas P. Healy, Esquire.

"For defendants Devitt, March and Post—Messrs Altman, Geraghty, Leonard & Mulally by Richard J. Leonard, Esquire, and Sydney C. Berde, Esquire.

"For defendant, Elmer L. Andersen—Richard J. Leonard Esquire.

"For The Bush Foundation—Richard J. Leonard, Esquire, and Benno F. Wolff, Esquire.

"For the defendants Arrowood and Dickman—Messrs Smith, Blomquist, Vitko & Rumniel, by Bertrand Poritsky, Esquire, and Neil P. Convery, Esquire.

"For Douglas M. Head, the attorney general—Robert J. Christianson, Esquire, Wright W. Brooks, Esquire, and John E. Harris, Esquire.

"The stipulation of settlement was to be approved by the Court within 40 days. However, problems apparently appeared; and on March 31, 1970, the District Court, upon request of counsel, agreed that the time for subsequent amendments to the stipulation would be extended to April 10, 1970.

"The stipulation was in fact approved by the Ramsey County District Court (Honorable Otis H. Godfrey, Jr., District Judge).

"It is observable at this point that the corporate arrangement for the board of directors which the stipulation arrived at differed from the structure with A and B directors which Mrs. Bush had wanted earlier. Taking the language of her Complaint in this action, she was

suing as a director. Yet this was not an action by the Foundation, for neither she nor the other plaintiffs had corporate authority to bring the action. They were all suing as individuals to compel a certain result. They were not separate personalities, such as trustee or executor for instance, by which they could sue. Mrs. Bush, through her attorneys, agreed to the new board arrangement. She personally received benefit from the Court determination.

"Hearing was held in Probate Court in St. Paul on April 17, 1969, on a petition for a second partial decree of distribution. Appearances were practically the same as in the District Court case, except that there was a representative present for First Trust Company of St. Paul. The Probate Court on May 15, 1969, decreed the distribution of real and personal property to The Bush Foundation of the total value of $44,029,646.69. In connection with that hearing, attorneys for the executors of the Archibald G. Bush estate gave notice in writing to Edyth G. Bush that if that second partial distribution would be made to the Foundation, 'such a transfer will reduce the amount of estate assets in the executor's hands to $36,395,677.06, and may impair your rights under Minnesota Statutes 525.16 and 525.212 if you should later decide to attempt to renounce Mr. Bush's will.' Notice of the filing of the second partial distribution decree and order was served upon Mrs. Bush personally on June 24, 1969.

"In connection with the notice to Edyth Bush and the second partial distribution, it is to be observed that Mrs. Bush apparently was advised as to the amount being distributed and what remained in the estate. She took no

steps to repudiate the distribution and in fact acquiesced in it. Should a later renunciation be attempted and possibly accomplished by her, the Foundation would be obliged to return substantial amounts to the executors of the Archibald G. Bush estate in order for her to receive distribution of her widow's half.

"On April 27, 1970, executors of the estate petitioned the Court for permission to distribute to the Foundation a further or third partial distribution including cash in the amount of $1,712,610.35, 'being the entire net income earned by said estate during the calendar year 1969'. The Probate Court on May 5, 1970, decreed this distribution to The Bush Foundation, and it was in fact so distributed. Notice of the filing of the decree was served on Edyth Bush personally at her Florida home on June 1, 1970.

"Intermediate accounts in the estate had been duly filed with the Court and allowed. There was subsequently filed in Probate Court the executors' petition for final account of October 15, 1971. The petition was dated November 23, 1971.

"On November 6, 1970, Edyth Bush had been declared incompetent by the County Judge's Court of Orange County, Florida. One group of individuals was declared guardian of her person. David R. Roberts and the Commercial Bank at Winter Park, Florida, were appointed guardians of her property.

"On October 12, 1971, the co-guardians filed in the Probate Court of Ramsey County what was purported to be a renunciation on her behalf of the Will of Archibald G. Bush. David R. Roberts, one of the guardians, is the identical name that appeared as a witness to the Last Will and Testament of Mr. Bush and on the consent and ratifica-

tion of the Will by Edyth Bush. This attempted renunciation was declared by the Honorable Andrew A. Glenn, Judge of Probate Court in Ramsey County, on March 1, 1972, to be of no force and effect; and Judge Glenn's order reiterated the position that the 'said widow and her co-guardians have no remaining interest in the estate.'

"This Probate Court determination has been appealed from in her behalf by the guardians. Meanwhile, and on November 20, 1972, Edyth Bush died. Probate of her estate has been commenced in Minnesota. The Ramsey County Probate Court file (134172) reveals a controversy as to whether she died a resident of Minnesota or of Florida.

"Action was commenced in the United States District Court, Minnesota, Third Division, by *H. Clifford Lee, Clarence J. Bassler, Jr., and the Commercial Bank at Winter Park as co-executors of the Estate of Edyth Bush, Plaintiffs, vs. Herschel S. Arrowood, individually and as a co-executor, and as a former director of The Bush Foundation; Mary Jane Dickman, individually and as a co-executor* * * *; *Cecil C. March, individually and as a director* * * *; *Honorable Edward J. Devitt, individually and as a director* * * *; *Richard L. Post, individually and as a former director* * * *; *Reuel D. Harmon, individually and as a director* * * *; *The Bush Foundation* * *, *Defendants* (Court File No. 3-72 Civil 98).

"That case involved much of the same disputed claims that were being made in the State courts. The Federal Court concluded in an 81 page opinion that it had jurisdiction over the subject matter. But it added that, without regard to the issue of res judicata, it should abstain from assuming jurisdiction where the Probate Court had pre-

viously handled the matter and 'has jurisdiction for enforcement.' The Federal Court added that 'the plaintiff should not now here be permitted to re-litigate the issues which have heretofore been litigated in the prior actions.'

"That Court then, however, concluded that 'this cause should be dismissed on the ground of res judicata, collateral estoppel and abstention.' It added:

'This Court does not reach the question of laches; however, it is pertinent for this Court to point out that there was a delay from 1966, when the action allegedly arose, until 1971 before any affirmative action was taken on the question of breach of the original agreement. This indeed is a lengthy, if not totally fatal delay.'

"One of the issues in our instant case is whether Mrs. Bush did not wait too long to file her attempted renunciation of the Will of Mr. Bush. Her guardians argue that she did not. The executors, they argue in effect, had misled her by purporting to stipulate a settlement, but that after it would normally be too late for her to renounce the Will, the stipulation was breached; the executors and A directors said the division of A and B directors was illegal and the executors did not proceed diligently to close the estate.

"It became the conclusion of respondents, except the attorney general and Judge Devitt, that a corporate arrangement for A and B directors on a bicameral basis was illegal under the Minnesota non-profit corporation statute. M. S. 317.20, Subd. 1, does not in fact provide for a bicameral directorship. It states simply:

'A board of at least three directors shall manage the business of the corporation.'

"The Court does not attempt here to rule on whether a bicameral directorship is legal. At least, by stipulation of counsel and approval by the District Court, a single directorship with Mrs. Bush as chairman was adopted as part of the settlement agreement.

"The propositions of law and fact filed by the executors of Mrs. Bush's estate include in effect the following: Within six months after commencement of probate, Mrs. Bush indicated her intention to renounce the Will. On August 27, 1966, to prevent her from renouncing it, an agreement of settlement was entered into. The Foundation amended its articles and by-laws to provide for a bicameral directorship. The Foundation agreed to be operated as it had been before Mr. Bush died in the manner whereby the advice and counsel of Mr. Bush had been sought before he died, 'so that The Bush Foundation would be operated in the manner and for the purposes intended by Mr. and Mrs. Bush.'

"The propositions state that the executors proceeded to breach the stipulation so that there was no consideration for it; the stipulation for reorganization was entered into by her attorneys without her authority and she would not have consented to it. The propositions further indicated that she was defrauded into joining in the stipulation.

"The Bush Foundation agrees that Mrs. Bush waited too long to renounce the Will and also that the right of renunciation died with her. It joins with the arguments in behalf of the executors and the attorney general who seek summary judgment in their favor.

"M.S. 525.212 states:

'* * * such spouse shall be deemed to have elected to take under the will, unless he shall have filed an instrument in writing renouncing and refusing to accept the provisions of such will within six months after the filing of the certificate of probate. For good cause shown, the court may permit an election within such further time as the court may determine * * *.'

"The Probate Court did not permit a renunciation after the six months had passed. If the appeal to this Court is proper, it would seem that it is a fact question for trial as to whether good cause for extension of time has been shown. Good cause was not shown at least as of the time Mrs. Bush's attempted renunciation was filed."

While the case seems quite complicated and much legal argument has been presented to us, it really involves a determination of two issues: (1) May the district court on appeal from an order of the probate court grant summary judgment? (2) Is the decision of the Honorable Otis H. Godfrey, Jr., referred to in the above statement of facts, res judicata of the issues plaintiffs now seek to try? Hereinafter, the opinion of Judge Godfrey will be referred to as the Godfrey decision.

The procedure upon an appeal to the district court from an order of the probate court is found in Minn. St. 525.72, which reads:

"Within 20 days after perfection of the appeal, the appellant shall file with the clerk of the district court, and serve upon the adverse party or his attorney a clear and concise statement of the proposition, both of law and of fact, upon which he will rely for reversal of the order, judgment, or decree appealed from; within 20 days after such service the adverse party may serve and file his an-

swer thereto and the appellant, within 20 days thereafter, may serve and file a reply. If there be no reply, allegations of new matter in the answer shall be deemed denied. *Demurrers shall not be permitted. The district court may allow or require any pleading to be amended, grant judgment on the pleadings, or, if the appellant fail to comply with the provisions hereof, dismiss the appeal.*

"After issues are so formed, the case may be brought on for trial by either party by the filing and service upon the attorney for the adverse party, or if he have none, then upon the clerk for him, of a notice of trial or note of issue, in accordance with the practice in the district court. *Thereupon the cause shall be placed upon the calendar, tried, and determined in the same manner as if originally commenced in that court.* All appeals other than those from the allowance or disallowance of a claim shall be tried by the court without a jury, unless the court orders the whole issue, or some specific question of fact involved therein, to be tried by a jury or referred." (Italics supplied.)

Appellants, who are the executors of Mrs. Bush's estate, contend that under this statutory provision, while the district court may grant judgment on the pleadings, it may not grant summary judgment.

We think it best to first dispose of the question of whether the judgment entered pursuant to the Godfrey decision is res judicata so that, if it is, the question of whether the district court had the right to grant summary judgment may be considered in light of the fact that litigation of all the fact issues appellants now seek to litigate in this case is barred by the res judicata effect of the Godfrey judgment. It seems to be the contention of appellants that they have a right to a trial de

novo on these issues even if the Godfrey decision is found to be res judicata and a bar to litigation of such issues.

Essentially, it is the contention of appellants that the Godfrey decision is not res judicata because (1) Mrs. Bush appeared in the action leading to the Godfrey judgment in her representative capacity as a director of the Bush Foundation and not in her individual capacity; (2) the requisite identity of causes of action between the case culminating in the Godfrey judgment and the case now before us is absent; and (3) the stipulation on which the consent judgment entered by Judge Godfrey was based was made by Mrs. Bush's counsel without her knowledge and without her authority. Each of these arguments can probably be considered separately.

Appellants state that the identity of parties in the two actions is lacking because in the one resulting in the Godfrey decision Mrs. Bush appeared in her representative capacity and in this case she, through her representatives, appears in her individual capacity. The general test is whether the named party is the real party in interest or a mere nominal party. See, Olson v. Linster, 259 Minn. 189, 107 N. W. 2d 49 (1960); Schmitt v. Emery, 215 Minn. 288, 9 N. W. 2d 777 (1943); Bamka v. Chicago, St. P., M. & O. R. Co. 61 Minn. 549, 63 N. W. 1116 (1895). On the question involving the identity of the parties, the trial court held:

> "* * * Taking the language of her Complaint * * *, she [Mrs. Bush] was suing as a director. Yet this was not an action by the Foundation, for neither she nor the other plaintiffs had corporate authority to bring the action. They were all suing as individuals to compel a certain result. They were not separate personalities, such as trustee or executor for instance, by which they could sue. Mrs. Bush, through her attorneys, agreed to the new

board arrangement. She personally received benefit from the Court determination."

It should also be mentioned that in the action involving the Godfrey decision, the attorney general was named as a defendant in the complaint, and, pursuant to Minn. St. 501.12, interposed a counterclaim and cross-claim in behalf of the public in which he alleged that both Class A and Class B directors were in breach of their fiduciary duties. He also alleged that, except for the amount allocable to maintenance of the Bush home in Florida, Mrs. Bush should disgorge the $2,100,000 she had received as part of the prior settlement. Whether this counter-claim was permissible under Rules of Civil Procedure, Rules 13.01 and 13.02, which require that a counterclaim be made against any "opposing party," we need not determine. Mrs. Bush answered this counterclaim in her personal capacity without seeking dismissal of it.

It is also abundantly clear that the stipulation of settlement upon which the Godfrey decision was based determined Mrs. Bush's personal rights as well as any she might have in a representative capacity. It was agreed, among other things, that she could retain the payment of $2,100,000; and the dispute over the two classes of directors also involved her personal rights. She also agreed to waive any right to renounce her husband's will.

Much could be said about the distinction between the doctrine of estoppel by judgment and collateral estoppel, but it would seem that in this case, no matter what basis we put it on, Mrs. Bush has agreed to a consent judgment which has been entered by a court having jurisdiction over the cause of action; that no appeal has been taken from that judgment; and that it still stands as a valid judgment. So, it must be held to be binding on the issues actually settled in that litigation.

Whether it be through an estoppel by judgment or a collateral estoppel, the consent judgment is binding upon her. With respect to the consent judgment, we said in the case of Pangalos v. Halpern, 247 Minn. 80, 84, 76 N. W. 2d 702, 706 (1956):

> "* * * [A]n order made upon the application, or with the consent, of all the interested parties is not ex parte. The fact that such an order is made upon an agreed statement of the facts or is entered by consent or upon the agreement of the parties does not lessen its force or effect, and it is as binding upon the parties as if made after protracted litigation."

In the case of In re Application of Schaefer to Register Title, 287 Minn. 490, 493, 178 N. W. 2d 907, 910 (1970), we quoted with approval the following from the Pangalos case (247 Minn. 85, 76 N. W. 2d 706):

> "* * * In the absence of fraud, a valid judgment, decree, or as here an order which is the equivalent thereof, entered by agreement or consent, operates as res judicata to the same extent as if it had been rendered after contest and full hearing and is binding and conclusive upon the parties and those in privity with them."

Had the case upon which the Godfrey judgment is based been tried and determined instead of disposed of by settlement, we doubt anyone would contend that the facts litigated therein were not res judicata. The stipulation went further than a trial in that the individual rights of Mrs. Bush were disposed of as well as her rights in a representative capacity. Had she tried these issues by consent, even though they were probably not included in the original pleadings, she would likewise be bound by the result.

It might be mentioned in passing that the case of Bush v. Arrowood, 293 Minn. 243, 198 N. W. 2d 263 (1972), was determined by this court some time ago. In that case the issue directly involved was the right of attorneys retained by the attorney general to be paid their fees out of foundation funds. In our decision in that case, we said in referring to the case upon which the Godfrey judgment was based:

> "* * * Due in a large part to the services performed by these attorneys, a stipulation of settlement was finally arrived at, and, on April 10, 1970, a judgment was entered in district court which disposed of the right of the widow to renounce the will of Mr. Bush, provided a workable board of directors for the foundation, and in many other respects provided an orderly and competent means of controlling and managing The Bush Foundation. None of the parties affected by that judgment appealed, and the res judicata effect of that judgment obviously is a substantial benefit to the foundation." 293 Minn. 246, 198 N. W. 2d 265.

While Bush v. Arrowood, *supra*, is not discussed in appellants' original brief, in their reply brief we find the following:

> "The Bush Foundation argues (pp. 39-40) that this Court has already said (in *Bush v. Arrowood*, 293 Minn. 243, 198 N. W. 2d 263): 'The res judicata effect of the Judgment and Decree [in the state court suit] cannot be disputed * * *.' This Court did not so hold. There the Attorney General sought recovery from the Foundation of attorneys' fees for his special counsel in the *Bush v. Arrowood* proceeding. The District Court held the Attorney General was entitled to recovery; this Court held he was not. That w s the *only* question before this Court. This

> Court said: 'The *only question* on this appeal is the validity of the court's order directing the foundation to pay a portion of these attorneys' fees.' "

Appellants apparently contend that what we said in Bush v. Arrowood, and quoted above, is dictum and therefore not binding upon the court at this time.

It may be true that what we said in the former Bush case was dictum, but if it was, it at least was a strong indication of this court's belief at that time that the Godfrey judgment was res judicata. As a matter of fact, the stipulation and the Godfrey judgment were involved in a determination of the amount of fees the attorneys were entitled to recover if they were entitled to recover from the foundation at all. So, the question was at least directly involved in that case. The court had hopes at that time that by indicating our belief that the Godfrey judgment was res judicata it would end this protracted litigation. Apparently our hopes were not realized. Even dictum, if it contains an expression of the opinion of the court, is entitled to considerable weight. We now hold that the judgment of the district court which decided the very questions appellants now seek to raise and litigate in this action is res judicata and bars any future litigation of these same issues.

In the case of State v. Rainer, 258 Minn. 168, 177, 103 N. W. 2d 389, 395 (1960), we said:

> "It seems clearly apparent that the statement and the reasoning in [State v. Lund, 174 Minn. 194, 218 N. W. 887 (1928)], even though this court in [State v. Nobles, 234 Minn. 38, 47 N. W. 2d 473 (1951)] referred to it merely dictum, was an expression of opinion on a question directly involved and argued by counsel though not en-

> tirely necessary to the decision. The expression of the court, under such circumstances, qualifies as judicial dictum and as such is entitled to much greater weight than mere obiter dictum and should not be lightly disregarded."

We quoted (258 Minn. 178, 103 N. W. 2d 396) from the opinion of Judge Donovan of the United States District Court in the case of Goodson v. United States, 151 F. Supp. 416, 420 (D. Minn. 1957), the following:

> "In ascertaining the Minnesota law on this question the federal court is not bound by dicta. * * * Yet while dicta are not conclusive evidence of the law of any state, *considered dicta*, as distinguished from mere obiter dicta, *should not be ignored*, * * * and are even entitled to great weight." (Italics supplied.)

We, therefore, agree with the trial court that, when consideration is given to t.. ·pulation of all the parties and the final disposition of the case and entry of judgment by Judge Godfrey, there is sufficient identity of the parties to meet the test of res judicata. We also hold that there is sufficient identity of causes of action. As a matter of fact, the same causes of action were involved in both cases and once the identity of the parties is established, the causes of action also become identical. Essentially, determination of whether the causes of action are the same depends to some extent on whether Mrs. Bush appealed in her individual capacity. It seems clear that she did.

The only other contention that merits discussion is the claim now made that Mrs. Bush did not authorize or consent to the settlement upon which the Godfrey judgment was based. We need not spend time on that issue. That she was represented

by competent counsel must be conceded. That she knew what she was doing must likewise be conceded.

On a motion for summary judgment we have held on many occasions that a party opposing such motion must do something more than simply rely upon the pleadings. Here there is nothing submitted, by form of affidavit or otherwise except mere conclusionary opinion, to show that the settlement was not made with Mrs. Bush's full consent. Rosvall v. Provost, 279 Minn. 119, 155 N. W. 2d 900 (1968); Ahlm v. Rooney, 274 Minn. 259, 143 N. W. 2d 65 (1966). It is also evident that Mrs. Bush was kept apprised of what was being done and of the action taken in her behalf by her attorneys. Whether or not she consented to the stipulation is a question of fact. The Godfrey court having determined that issue adversely to her, and no appeal having ever been taken from that determination, she is clearly now bound by it.

We then come to the question of whether the district court on appeal from an order of the probate court may grant summary judgment. This, in turn, revolves around the proper interpretation of the language in Minn. St. 525.72, where we find the following:

> "* * * Thereupon the cause shall be placed upon the calendar, tried, and determined in the same manner as if originally commenced in that court."

The crux of appellants' argument relates to the proper interpretation of Rule 81, Rules of Civil Procedure. Apparently it is the contention of appellants that since Minn. St. 525.72 does not expressly authorize the district court to entertain a motion for summary judgment on appeal from the probate court, its power to do so, if any, must be derived from Rule 56, Rules of Civil Procedure, which authorizes a district court in the ex-

ercise of its trial jurisdiction to order summary judgment, but that Rule 81.02 prohibits recourse to Rule 56. Rule 81.02 provides that the Rules of Civil Procedure "do not supersede the provisions of statutes relating to appeals to the district courts."

While much could be said in disposing of this contention, we think it sufficient to refer to the case of Nationwide Corp. v. Northwestern National Life Ins. Co. 251 Minn. 255, 87 N. W. 2d 671 (1958). We there held that the Rules of Civil Procedure would apply to a mandamus proceeding where the relevant statute, Minn. St. 586.08, provided that "proceedings [shall be] had, in the same manner as in a civil action." We held this language sufficient to invoke Rule 81.03, which states that "[w]here any statute * * * provides that any act in a civil proceeding shall be done in the manner provided by law, such act shall be done in accordance with these rules." In so holding, we attempted to outline a definite test for determining the applicability of the rules to a particular statute. We said:

> "* * * Where a statute governing a civil proceeding, not superseded by our rules of civil procedure, provides that the proceeding shall be conducted in the same manner as a civil action or uses other language of like import, the statute adopts the procedure of the rules by reference in the absence of a specific provision in the statute itself inconsistent with the rules." 251 Minn. 266, 87 N. W. 2d 680.

Appellants argue in substance that Minn. St. 525.72 does not state that the proceedings shall be conducted in the same manner as a civil action but merely that they shall be "tried, and determined" in the same manner as a civil action. Thus,

they argue, Rule 81.03 does not operate to incorporate by reference into Minn. St. 525.72 any of the Rules of Civil Procedure which govern pretrial proceedings. We think this argument is simply a play upon words. The words "tired, and determined in the same manner as if originally commenced in that court" must include the right to dispose of the case the same as if it had been commenced in the district court. We think this carries with it the right to grant summary judgment where there are no issues of fact to be tried or where the law bars litigation of such issues.

A motion for summary judgment calls for a determination of the issues of law when there are no material fact issues to be tried and results in a decision on the merits. In the authors' comment to Rule 56, Hetland and Adamson point out:

> "Rule 56 is a device designed to implement the stated purpose of the rules to secure a just, speedy and inexpensive determination of any action. A summary judgment permits the court to make a prompt disposition of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such established facts." 2 Hetland & Adamson, Minnesota Practice, Civil Rules Ann., p. 563.

Appellants argue in substance that one of the elements of the Nationwide test is absent in the instant case because Rule 56 is inconsistent with the provisions of Minn. St. 525.72. First, they argue, that Minn. St. 525.72 grants a substantive right to a trial de novo while Rule 56 permits summary dismissal with no trial at all. They argue in fact that in a trial de novo a court should have no power to cut short the proceeding except by granting judgment on the pleadings. In the case of

Grier v. Estate of Grier, 252 Minn. 143, 145, 89 N. W. 2d 398, 401 (1958), we rejected the contention that the district court's granting of judgment on the pleadings denied appellants the right to a trial de novo, stating:

> "* * * Whether it be in an action initially commenced in the district court or in a proceeding brought to that court as a de novo matter by appeal from the probate court, an adversary's motion for judgment on the pleadings is properly granted if, as a matter of law, the appellant is entitled to no relief on the pleadings. Where the pleadings do not warrant the granting of any relief, there is no purpose in conducting a de novo trial on the merits."

The same would seem to be true of a motion for summary judgment. If there are no fact issues that can be litigated due to the bar of res judicata in the former action, it would make little sense to require a trial de novo. To construe the statute involved as permitting a motion for judgment on the pleadings while forbidding a motion for summary judgment where there are no fact issues to be tried would simply be reviving the technicalities which the Rules of Civil Procedure seek to avoid and which were condemned by this court in House v. Hanson, 245 Minn. 466, 72 N. W. 2d 874 (1955).

In view of our determination that the decision in the Godfrey judgment is res judicata as to all the issues appellants seek to litigate, we need not decide whether estoppel or waiver also bars the litigation of these issues. If they are barred by res judicata, that ends the matter. We think that is the case here.

It is difficult to understand what appellants expect to accomplish by this litigation. The estate has now been largely, if not wholly, distributed according to the wishes of both Mr.

and Mrs. Bush. If Mrs. Bush's right to have some control over the operation of the Foundation had any value during her life, that right has now vanished by virtue of her death. She no longer could have any voice in controlling the affairs of the Foundation and it seems to us that these claims are now moot.

Inasmuch as we hold that the Godfrey decision was res judicata of all of the issues appellants seek now to try, it must follow that the summary judgment of the court must be, and is, affirmed.

Affirmed.

MR. CHIEF JUSTICE SHERAN and MR. JUSTICE OTIS took no part in the consideration or decision of this case.

IN THE

Supreme Court of the United States

October Term 1974

74-551

H. CLIFFORD LEE, et al.,

Petitioners,

vs.

HERSCHEL S. ARROWOOD, et al.,

Respondents.

BRIEF OF RESPONDENTS HERSCHEL S. ARROWOOD AND MARY JANE DICKMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term 1974

No. 551

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of Edyth Bush, a/k/a Edyth D. Bush, a/k/a Mrs. A. G. Bush, deceased,

Petitioners,

vs.

HERSCHEL S. ARROWOOD, individually and as a Co-Executor under the Last Will and Testament of Archibald G. Bush, deceased, and as a former director of The Bush Foundation; MARY JANE DICKMAN, individually and as a Co-Executor under the Last Will and Testament of Archibald G. Bush, deceased; CECIL C. MARCH, individually and as a director of The Bush Foundation; ELMER L. ANDERSEN, individually and as a director of The Bush Foundation; Honorable EDWARD J. DEVITT, individually and as a director of The Bush Foundation; RICHARD L. POST, individually and as a former director of The Bush Foundation; REUEL D. HARMON, individually and as a director of The Bush Foundation; THE BUSH FOUNDATION, a Minnesota Non-Profit Corporation, THOMAS MALONE, as Clerk of the Probate Court, Ramsey County, Minnesota; JOSEPH P. LA NASA, as Clerk of the District Court of Ramsey County, Minnesota; and WARREN R. SPANNAUS, as Attorney General of the State of Minnesota,

Respondents.

BRIEF OF RESPONDENTS HERSCHEL S. ARROWOOD AND MARY JANE DICKMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents pray that the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit in the above entitled matter be denied, and respectfully show to the Court:

We believe that the issues in the case originally presented to the trial court below have been decided by the most recent Minnesota Supreme Court Decision, *In re Estate of Archibald G. Bush*, —— Minn. ——, No. 44707, decided November 22, 1974 whereby the instant case is now moot as so ably argued by the other Respondents herein and whose brief on the subject we adopt as our own. We will, therefore, briefly direct our reply to the four reasons urged by the Petitioners as grounds for this Court's grant of a writ of certiorari.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED

1. The decision below is not in outright conflict with this Court's decision in *United States v. Michigan National Corporation*, —— U.S. ——, No. 73-1737, decided October 21, 1974. The facts present in the *Michigan National Corporation* case upon which this Court held a stay rather than a dismissal was required are notably absent in the instant case. There the Appellant was faced with the very possible bar of bringing its anti-trust action if such were not commenced within the thirty (30) day period following a regulatory Board's approval to a transaction. In that case the approval had already been given and the thirty (30) days statutory period of commencing an anti-trust action had in fact begun to run. The application of the Abstention Doctrine with a stay rather than a dismissal clearly was called for in that case. Petitioners herein have not

shown and cannot show that their cause of action, if one exists, will be barred by such a stringent limitation as was present in the *Michigan National Corporation* case.

2. Due process is not denied by the Court's failure to adjudicate a breach of contract claim asserted by the Petitioners in the action dismissed by the trial court. Such a claim if it has not now been barred by the most recent decision of the Minnesota Supreme Court, *In re Estate of Archibald G. Bush*, —— Minn. ——, No. 44707, decided November 22, 1974, could have been timely brought in state court. If in fact Petitioners are denied the right to have their claim adjudicated in a court of law, it is because Mrs. Bush and her guardians have failed to timely prosecute such a claim. The delay involved in this case was such that the trial court made particular mention of the fact at the close of its opinion. (A75).

3. The application of the doctrine of abstention by the trial court of Petitioners' claim is in fact supported by the rationale asserted in *Burford v. Sun Oil Co.*, (1943), 319 U.S. 315, and *Alabama Public Service Commission v. Southern Railway Co.*, (1951), 341 U.S. 341. The Petitioners, underneath all of the verbiage about the widow being defrauded of rights allegedly secured by contract, claim in essence that Mrs. Bush was deprived by fraud from taking a one-half share of her Husband's Estate which at the time of his death had a value of approximately $125,000,000.00. Adjudicating the Petitioners' case would require a construction of local probate law by the trial court to determine whether Mrs. Bush did in fact have such a right after her husband died, since a determination that one did not exist under Minnesota State Law now would cause

the instant damage claim for $100,000,000.00 to fail.[1] A resolution of this claim, therefore, we maintain, involves not only contract law but the administration of decedents' estates in the State of Minnesota which is properly considered a state activity that should be left to the state courts. The Circuit Court of Appeals correctly recognized this case as fitting the mold for abstention as enunciated in both the *Burford* case and the *Alabama Public Service Commission* case. (A84).

Petitioners erroneously construe *Brillhart v. Excess Insurance Company of America*, (1942), 316 U.S. 491, as support for their claims that the Abstention Doctrine is not applicable herein. However, the *Brillhart* case clearly recognized that the decision to accept or refuse to entertain a claim such as the instant one properly lies within the discretion of the trial court. This Court in *Brillhart* remanded the cause to the trial court so that the trial court could properly exercise its discretion in passing upon a Motion to dismiss the cause. Our trial court did follow the directives set in *Brillhart*, in that it did seek to determine whether issues raised in the present action were subject to determination in the state court proceedings. In fact, most of the trial court's opinion concerned itself with an exhaustive review of the contents of the complaint, related documents and pleadings, and issues raised in other state court litigation and proceedings prosecuted by Edyth Bush or on her behalf in the state courts.

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[1] Minnesota Statutes § 525.145 relating to descent of the homestead and Minnesota Statutes § 525.16 relating to the descent of all other property secures to the surviving spouse, where there are no surviving issue, the homestead and one-half of the decedent's personal property free from any testamentary disposition thereof to which the surviving spouse shall not have consented in writing or by election to take under the Will of the decedent. Edyth Bush, the surviving spouse, did give her written consent to her husband's Will (A15) and though the validity of such consent has been denied by her, the issue has never been adjudicated.

4. As to Petitioners' fourth reason for a grant of certiorari, we believe it has received an adequate reply in our brief discussion of the *Michigan National Corporation* case above.

CONCLUSION

Petitioners clearly have failed to bring their case within the scope of those areas of particular concern expressed in Rule 19 of this Court which would warrant a review on writ of certiorari. Further, as ably illustated by other Respondents herein, the case that the Petitioners seek to have submitted to the trial court is now moot. Therefore, Respondents urge that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1974

No. 74-551

H. CLIFFORD LEE, *et al.*,
Petitioners,

vs.

HERSCHEL S. ARROWOOD, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Supreme Court of the United States

October Term, 1974

No. 74-551

H. CLIFFORD LEE, *et al.*,
Petitioners,

vs.

HERSCHEL S. ARROWOOD, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

The Response to the Petition for Certiorari:

1. Correctly states that "Petitioners here have consistently claimed" that the 1970 state court judgment (on the basis of which the widow has been stripped of her widow's share in her husband's estate) cannot be res judicata of the widow's claim and correctly states the basis of that claim.[1]

2. Correctly argues that if the November 22, 1974, decision of the Supreme Court of Minnesota[2]

[1] See page 8 of the Response by The Bush Foundation, et al., concurred in and adopted by the Attorney General and by the brief filed on behalf of the Executors of the husband's estate.

[2] Printed in the Appendix to the Brief of Respondent The Bush Foundation, et al.

stands, the widow's claim to her statutory share in her husband's estate is foreclosed.

However, the decision by the Supreme Court of Minnesota now relied upon by Respondents rests upon a massive denial of due process because it assumes as "facts" matters *on which there has never been hearing or adjudication by any court.* If that denial of federal constitutional right is not cured upon Petition for Rehearing which these Petitioners filed on December 6, 1974, Petitioners will bring the issue to this Court.

The Petition for Rehearing now pending before the Minnesota Supreme Court is reproduced in the Appendix to this Reply. It reveals the quicksand which alone is the foundation of the Minnesota Supreme Court decision.

This Court, therefore, should withhold ruling on the present Petition for Certiorari to await the final decision of the Supreme Court of Minnesota. If that court does not cure its denial of federal constitutional right, this Court can consolidate the present Petition for Certiorari with a new one directed to the Minnesota Supreme Court judgment, and, before this Court rules, thus have before it the full tawdry picture of fraud by which this widow has been done out of her statutory share of her husband's estate, and for which she clearly is entitled to assert her claim for damages for breach of that contract of settlement.

Respondents' assurance that the widow is "down to her last $130 million"[3] does not excuse their fraudulent breach of the contract of settlement they made with this widow, in reliance upon which she forebcre filing the renunciation she had signed, nor does it cure the denial of due process by which she has been stripped of her rights.

---

[3] Page 13 of the Response by The Bush Foundation, et al.

It but makes the fraud the greater and the need for this Court's scrutiny the more imperative.

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December 9, 1974

APPENDIX

Petition for Rehearing filed December 6, 1974, by these Petitioners directed to the Minnesota Supreme Court decision of November 22, 1974, identifying the denial of federal constitutional right on which the Minnesota Supreme Court decision rests.

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State of Minnesota
In Supreme Court

In re Estate of ARCHIBALD G. BUSH, Deceased

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of Edyth D. Bush, Deceased,

Appellants,

vs.

HERSCHEL S. ARROWOOD and MARY JEAN DICKMAN, as Executors of the Estate of Archibald G. Bush, Deceased.

and

THE BUSH FOUNDATION,

and

WARREN SPANNAUS, Attorney General of the State of Minnesota,

Respondents.

PETITION FOR REHEARING

Appellants, Executors of the Estate of Edyth D. Bush, deceased, petition for rehearing of this Court's decision in this cause on the grounds:

1. **This Court has decided the case under misapprehension of fact.** The Court decided as it did in the belief that Judge Godfrey's decision in *Bush v. Arrowood* is res judicata of the widow's right to renounce. The Court so held in the mistaken belief that:

> "Mrs. Bush has agreed to a consent judgment which has been entered by a court having jurisdiction over the cause of action;" (Opinion, p. 16)

> "the individual rights of Mrs. Bush were disposed of." (Opinion, p. 17)
>
> "That she was represented by competent counsel must be conceded. That she knew what she was doing must likewise be conceded." (Opinion, p. 20)
>
> "Mrs. Bush was kept apprised of what was being done and of the action taken in her behalf by her attorneys." (Opinion, p. 20)

Were these the facts, there would be no quarrel with this Court's decision.

But whether these are facts **has never been adjudicated by any court.** On these matters there has never been a hearing in any court.

There is no question that the widow was represented by competent counsel. Being competent, they never entered the personal appearance of Mrs. Bush. The only appearance they ever made in instituting the action (A. 114, 148-149), in the Reply to the Counterclaim by Attorney General (R. 26, 30), in the Stipulation of Settlement (A. 149, 158), was on behalf of "plaintiffs," who, as this Court recognized (Opinion, p. 16), were the Class B Directors in their representative capacity.

Under this Court's decisions, counsel could not enter appearance on behalf of their clients without their clients' consent, *Park, Grant & Morris v. Shannon & Mott Co.* (1918), 140 Minn. 60, 167 N.W. 285, and assuredly, as this Court ruled in *Matteson v. Blaisdell* (1921), 148 Minn. 352, 355, 182 N.W. 442, 443:

> "We regard it as settled in this state that the attorneys had no implied authority to settle and compro-

> mise plaintiff's lawsuit without his knowledge or consent."

If, as this Court held, Olsen's individual rights are not determined by a judgment against him as trustee, *Olsen v. Linster* (1960), 259 Minn. 189, 191, 197 N.W.2d 49, 50, and Bamka's individual rights are not barred by a judgment against him as guardian ad litem, *Bamka v. Chicago, St. P., M. & O. R. Co.* (1895), 61 Minn. 549, 552, 63 N.W. 1116, it is obvious that the widow's personal rights cannot (without overruling a good deal of precedent) be foreclosed by judgment entered in the derivative action brought by the Class B Directors on behalf of the Foundation.

It is no answer that the widow was not authorized by the Foundation to represent the Foundation. (Opinion, p. 9.) That is the very nature of a derivative action. The individual is heard to speak because the entity for whose benefit the action is brought will not.

Here the widow **could not consent.** When the judgment was entered, the widow was, **and had been for more than a year,** disabled by a massive stroke from which she never recovered and for which the Florida court was to adjudge her incompetent and appoint guardians for her. (A. 257.)

2. **The widow's right has been taken away without the procedural due process the Constitution requires.** This Court considered it "difficult to understand what appellants expect to accomplish by this litigation." (Opinion, p. 22.) The widow gave up her right to one-half her husband's estate in reliance on the settlement. (A. 27.) But,

once the settlement was made and approved by the probate courts in Minnesota and Florida, and the statutory period for renunciation had passed, the Executors and the Class A Directors of the Foundation did a complete about face. They:

1. Pursued the Probate Judge to the ski slopes in Vail, Colorado, and **without notice to the widow, her colleagues or her counsel,** obtained an **ex parte** order vacating the adjudication that The Bush Foundation **is** the "residuary legatee" and vacating the order to make distribution to The Bush Foundation.

2. Activated the A.G. Bush Institute, a paper corporation established by the husband a year before his death. It had never had a meeting, had no assets, no bylaws, no officers. It was named in the Will as an alternate to receive the residue **if** The Bush Foundation "be unable to take * * *." The belated resurrection of the Institute signaled the determination of the Executors and the Class A Directors to substitute the Institute as the residuary legatee in place of the Foundation.

3. Petitioned the probate court to vacate the order approving the settlement. The petition ultimately was dismissed by the probate court and the adjudication approving the settlement therefore still stands. There is the real res judicata in this litigation.

This is not a pretty picture.

These facts cry for examination.

It is no answer that the widow is dead. Contract rights are not extinguished by death. The widow is entitled either:

1. To be given the right to renounce, or

2. To recover damages for breach of the contract of settlement. Her damages are a recovery of what she gave up, **viz:** one-half of her husband's estate.

This right has been taken away without any examination of the facts by any court. There has been no hearing at any time in any court on these facts. That this is a denial of due process is clear from decisions such as *Sniadach v. Family Finance Corp.* (1969), 395 U.S. 337, holding wages cannot be garnished without notice or hearing; *Goldberg v. Kelly* (1970), 397 U.S. 254, holding that welfare benefits may not be taken away without notice and hearing; *Fuentes v. Shevin* (1972), 407 U.S. 67, holding a debtor's goods may not be seized without notice and hearing.

This Court may be able, on some ground not yet developed, to strip the widow of her right to renounce because the statutory period has expired, but the Court should not in this action undertake to pass on the question whether the widow has a right to damages. That issue was not, and could not be, before the probate court from which this appeal comes. The **only** jurisdiction the probate court had was to pass on renunciation. "Since the probate court did not have jurisdiction to determine the issue of fraud," neither does this Court, because "our jurisdiction is only appellate * * *." *Bulau v. Bulau* (1940), 208 Minn. 529, 532-3, 530, 294 N.W. 845, 848, 846. Nor did the probate court have jurisdiction to determine an action for damages for breach of contract. (Respondent Bush Foundation Brief, pp. 24-25).

3. **The decision in this case exceeds the proper bounds of appellate judicial review.**

> "It is the general rule that the province of the supreme court is to determine questions of law and not to make findings of fact." *Kennedy v. Thompson Lumber Co.* (1947), 223 Minn. 227, 281, 26 N.W. 2d 459, 461.
>
> "It is not the province of this court to make or amend findings of fact nor can we assume facts to be proven except in those rare cases where they are conclusively established." *Lehman v. Hansord Pontiac Co.* (1955), 246 Minn. 1, 12, 74 N.W.2d 305, 312.

While a district court is not required to make findings of fact pursuant to Rule 52 in ruling on a motion for summary judgment, the above authorities proscribe the right of this Court to determine facts or to assume facts to be proven.

Each of the quotations from the decision of this Court set out under point 1 above is a statement of fact which this Court either is making or assuming to have been proven. Each is an issue of material fact which has never been adjudicated. These "assumed facts" could not properly have been determined by the court below on a motion for summary judgment. **Respondents below did not direct themselves to any one of these facts.** There is absolutely nothing in the record below or in the prior case of *Bush v. Arrowood*, either in the proceedings before Judge Godfrey or in the appeal on the issue of whether the Attorney General or his special counsel were entitled to be paid for their

services from a charitable trust, which would support the conclusions which this Court now assumes are facts.

It is conceded that the attorneys for the plaintiffs were most competent counsel. But nowhere in the record in *Bush v. Arrowood* is there the slightest indication that these counsel were ever retained by Mrs. Bush to represent her in an individual capacity or that they in fact did. Every appearance which counsel made, every pleading which they signed, the Stipulation of Settlement, was as attorneys for plaintiffs in their representative capacity.

This Court has stated that "Mrs. Bush answered this counterclaim in her personal capacity without seeking dismissal of it." (Opinion, p. 16) In view of the conceded competence of the attorneys representing the plaintiffs, if any proper conclusion is to be drawn therefrom it is that they deliberately responded to the counterclaim of the Attorney General solely on behalf of the plaintiffs in the representative capacity in which the action had been brought and deliberately avoided any personal appearance on behalf of Mrs. Bush individually.

The Court further said:

> "It is also abundantly clear that the stipulation of settlement upon which the Godfrey decision was based determined Mrs. Bush's personal rights as well as any she might have in a representative capacity. It was agreed, among other things, that she could retain the payment of $2,100,000;" (Opinion, p. 16)

It cannot be disputed that the August 1966 settlement was based on mutual considerations between Mrs. Bush, The Bush Foundation, and the Executors of the Estate of

A. G. Bush. It must be conceded that the consideration for the payment to Mrs. Bush of $2,100,000 was the settlement of the "free of charge" dispute. It must be further conceded that the consideration for which Mrs. Bush agreed to withhold the filing of her executed renunciation was the agreement of The Bush Foundation to establish a bicameral board in a form which would give to Mrs. Bush and the other directors of her choice a veto power over the operations of The Bush Foundation. This assured in perpetuity that the charitable intent of the donors, Mr. and Mrs. Bush, would be carried on. It must be further conceded that this consideration was taken away by the Godfrey judgment.

These are "facts" which the court below refused to accept. These are "facts" which this Court has overlooked by **making** or **assuming** "facts" which never have been established.

Still referring to the Godfrey decision, this Court went on to say:

> "She also agreed to waive any right to renounce her husband's will." (Opinion p. 16)

This is a most unfortunate misstatement of fact which nevertheless apparently influenced the Court in reaching its conclusion that there was identity of causes of action. It rests solely on the recitation in Judge Godfrey's opinion that in the settlement agreement of August 26, 1966, Mrs. Bush waived her right to renounce.

4. **The Court has misapplied dictum.** The Court (p. 19) has given effect to its 1972 dictum, on an issue **then**

not even before the Court, as a prejudgment of this case. This Court explained (p. 18):

> "The Court had hopes at that time [in 1972] that by indicating our belief that the Godfrey judgment [of 1970] was res judicata it would end this protracted litigation. Apparently our hopes were not realized."

The Court could not have so written had it recalled that the right to renounce now here before the Court was not even mentioned, let alone claimed or in issue, in the Judge Godfrey proceedings that this Court reviewed in 1972. The only question the Court then had before it was the right of the Attorney General to be paid counsel fees for his services in that litigation. This Court said that this was the **only** question then before it.

> "The reasonableness of the total charges made by respondents in rendering their services to the attorney general is not in dispute. The **only question** on this appeal is the validity of the court's order directing that the foundation pay a portion of these attorneys' fees." *Bush v. Arrowood* (1972), 293 Minn. 243, 247, 198 N.W.2d 263, 265.

By no rule of law may a court by dictum in 1972, on a point not before it, decide an issue to come before the court in 1974. The only precedent there is for this is in *Alice in Wonderland,* where is laid down the rule: "Sentence first—verdict afterward."

State v. Rainer (1960), 258 Minn. 168, 177, 103 N.W. 2d 389, 390, relied on by this Court, has no application to the case at bar. The statement in its 1972 case that

this Court relied upon, that (p. 17), "a judgment was entered in district court [in 1970] which disposed of the right of the widow to renounce the will of Mr. Bush," was neither "necessary to the decision," nor (p. 19) was it "an expression of opinion on a question directly involved and argued by counsel."

The right of renunciation was in no way involved in the case before Judge Godfrey or in the 1972 appeal to this Court on the limited question relating to attorneys' fees. No reference to the right of renunciation can be found either in the entire record of that case below or in the briefs filed in this Court. The fact that the services performed by the special counsel for the Attorney General were of substantial benefit to The Bush Foundation was never in dispute. The trial court did not delineate the specific nature of such benefit, nor was it "necessary to the decision" for this Court to do so. The only issue before this Court was whether the Attorney General or his special counsel were entitled to recover attorneys' fees for such services from a charitable trust fund under the equitable rule of "substantial benefits". This Court held there was no right to such fees. The factual recitation in this Court's 1972 decision was not "an expression of opinion on a question directly involved and argued by counsel." It was no part of the decision of the Court on the sole issue to be decided on that appeal.

This Court should rather have followed the rule enunciated in *State v. Rainer*:

> "Of course, a ruling not necessary to the decision of a case can be regarded as only 'dictum' ". 258 Minn. at 179, 103 N.W.2d at 396.

Or the Court should have followed the rule stated in *State v. Naftalin* (1956), 246 Minn. 181, 74 N.W.2d 249 (opinion by then Justice Knutson) as follows:

> " 'Dicta', or more properly 'obiter dicta,' generally is considered to be expressions in a court's opinion which go beyond the facts before the court and therefore are the individual views of the author of the opinion and not binding in subsequent cases.
>
> * * *
>
> The reason for the rule of obiter dicta is obvious. The questions actually before the court and argued by counsel are thoroughly investigated, deliberately considered with care, and, when so investigated and considered, a decision on those issues is entitled to respect in future cases. Obiter dictum, on the other hand, is a statement of the judge on an issue not so deliberately investigated and, for that reason, is not entitled to the same respect." 246 Minn. at 208, 209, 74 N.W.2d at 266.

Or the Court should rather have followed the rule stated in a case subsequent to *State v. Rainer*, in which the Court in an opinion by then Chief Justice Knutson said:

> "The scope of any opinion by this Court is limited to the facts and issues involved in the decision, and anything said in excess of deciding these issues is pure dictum." *Haskin v. County of Hennepin, Glen Lake Sanatorium* (1964), 268 Minn. 21, 28, 127 N.W.2d 522, 527.

The present opinion is directly contrary to well established law. What was said in the former *Bush* case was dictum, and not even dictum of law. It was not entitled to any weight or consideration in the case at bar.

5. **The Court has mistakenly imposed a burden on Appellants that is foreign to the law governing summary judgment.** It was not incumbent upon Appellants to show, by affidavit of otherwise, (p. 20) "that the settlement was not made with Mrs. Bush's full consent." Nothing in *Rosvall v. Provost* (1968), 279 Minn. 119, 155 N.W.2d 900, relied upon by the Court (p. 20) supports such obligation. To the contrary, Respondents, to support their motions for summary judgment, must adequately "negate any issue of fact raised by the pleading." It is only then that the nonmoving party may not rely on assertions in his pleadings to create fact issues. This Court agreed (p. 20), "whether or not she consented to the stipulation is a question of fact." The Court mistakenly said (p. 20) the Godfrey Court "determined that issue adversely to her * * *." This statement is without any support.

The Godfrey Court at no time had this issue before it. This issue is raised for the first time in Appellants' Propositions of Law and Fact (A. 295, 301). This admitted fact issue was not controverted in any of the affidavits or documents submitted in support of Respondents' motions for summary judgment below nor in the additional documents included in Appellants' Appendix at the request of Respondents or in the Appendix of Respondents Arrowood and Dickman, none of which were presented to the court below. It needs to be remembered that:

> "* * * in passing upon a motion for summary judgment, the sole function of the trial court is, therefore, to determine whether there is an issue of fact to be tried." *Ahlm v. Rooney* (1966), 274 Minn. at 262, 143 N.W.2d at 68.

Neither the court below nor this Court could properly decide this fact issue on a motion for summary judgment because the moving party never negated the issue.

This Court went on to quote (p. 15) a portion of the opinion of the court below on the question involving the identity of the parties. In adopting this language and relying upon it, the Court overlooked *McMenomy v. Ryden* (1970), 286 Minn. 358, 176 N.W.2d 876. (Appellants' brief, p. 35.)

On the question of identity of causes of action, the Court ignored *State of Wisconsin v. Torinus* (1881), 28 Minn. 175, 9 N.W. 725 (Appellants' brief, p. 37), where the Court pointed out:

> "Care must be taken also to distinguish between **identity of the subject-matter of litigation and identity of cause of action—a distinction often overlooked.** The subject-matter of litigation may be the same, and yet the cause of action entirely different." (Emphasis by the Court). 28 Minn. at 180, 9 N.W. at 727.

Neither the court below nor the decision of this Court even attempts to delineate the issues involved in Judge Godfrey's decision that this court relied upon and the issues involved in the present litigation.

At no time subsequent to the August 1966 settlement, did Mrs. Bush or anyone on her behalf assert the right to claim her widow's share of her husband's estate until the institution of the present proceedings in the Probate Court of Ramsey County which are the starting point of the present litigation.

6. **The Court has improperly departed from the set-**

tled law governing the application ot the Rules of Civil Procedure as declared by the Court in *Nationwide Corp. v. Northwestern National Life Ins. Co.* (1958), 251 Minn. 255, 87 N.W.2d 671. If the Court intended to hold that all of the Rules of Civil Procedure are applicable to an appeal from the Probate Court of Ramsey or Hennepin County, this is contrary to the specific language of Rule 81.02.

If the decision is limited to permitting a motion for summary judgment on appeal from Probate Court of Ramsey or Hennepin County, the Court has erroneously determined that there is language in *M.S.A.* 525.72 which falls within the rule laid down in *Nationwide Corp. v. Northwestern National Life Ins. Co.* (1958), 251 Minn. 255, 87 N.W.2d 671.

Much can be said for making Rule 56 applicable to an appeal from the Probate Court of Ramsey or Hennepin County, but if that is to be done it should be by amendment of Rule 81.02 or by statutory amendment of *M.S.A.* 525.72 and not by judicial decision which ignores the meaning intended when the rule was adopted.

This is not a case in which it is suggested that (p. 23) a technicality should be **revived.** If it be a technicality that prior to the adoption of the Rules of Civil Procedure the only available pretrial motion to dismiss an appeal from the Probate Court was a motion for judgment on the pleadings, so be it. Rule 81.02 **preserved** that technicality. As this Court observed in *House v. Hanson* (1955), 245 Minn. 466, 72 N.W.2d 874:

"The words of a court rule, like those of a statute,

> must be taken and construed in the sense in which they were understood and intended at the time the rule was promulgated. Any other principle of construction would undermine confidence in the court's rule-making power." 245 Minn. at 473, 72 N.W.2d at 878.

7. **The Court erred in giving weight to the Federal District Court's decision.** The trial court relied on that decision (A. 371). This Court has compounded the error by adopting (p. 11) that portion of the trial court's opinion. The Federal Appeals Court affirmed the lower court decision **solely** on the ground of abstention and directed the lower court to dismiss the action **without** prejudice.

> "Accordingly, we affirm the decision of the district court solely upon the basis of abstention. We remand the case to the district court for the single purpose of modifying the judgment to reflect abstention as a basis for dismissal **rather than a decision on the merits."** *Bassler v. Arrowood* (1974), 500 F.2d 138, 143.

While Appellants have pending in the United States Supreme Court a Petition for Writ of Certiorari for the purpose of attempting to avoid the dismissal, even without prejudice, the prior determination of the United States District Court is no longer effective and the matter presently stands as though that action had never been commenced.

CONCLUSION

Unless this Court can find a basis for denying renunciation other than res judicata, it should remand the case for examination of the facts on which the widow has been done out of both the settlement and her statutory one-half of her husband's estate. The Court should make clear, if the widow is not now entitled to renounce, that whether she has a claim for damages for breach of the settlement contract is an issue to be resolved after trial in the proper court.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1974

No. 74-551

H. CLIFFORD LEE, *et al.*,
Petitioners,

vs.

HERSCHEL S. ARROWOOD, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners seek rehearing of this Court's denial of certiorari and in support thereof say:

1. An intervening event of substantial and controlling effect which was not before the Court when it denied certiorari has occurred. Respondents, in opposing certiorari, relied upon the decision of the Minnesota Supreme Court in the companion case of *Lee v. Arrowood* decided November 22, 1974. That decision rests upon a massive denial of due process identified in the petition for certiorari petitioners are filing concurrently herewith.

2. The two cases present opposite sides of the same coin, *viz:*

The Eighth Circuit case involves a widow's right *to recover damages* for breach by respondents of the contract by which they induced her to give up her right to renounce her husband's will. The Eighth Circuit dismissed on the ground the federal court should abstain jurisdiction pending completion of proceedings then pending in state court.

The Minnesota Supreme Court case involved the widow's right *to be restored to her right to renounce* on the ground she was tricked into giving up her statutory right to renounce. The Minnesota Supreme Court, overlooking the requirements of due process, held the widow's right to renounce barred by a prior state court judgment.

3. Grant of rehearing in this cause will enable the Court to have *both* cases before it in considering whether it can sanction the flagrant disregard of the demands of due process that has occurred.

Respectfully submitted,

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January 27, 1975

Certificate of Counsel

I, THOMAS V. KOYKKA, counsel for petitioners, certify that this petition for rehearing is presented in good faith and not for delay and that it brings to the Court's attention an intervening event of substantial and controlling effect and is limited thereto.

THOMAS V. KOYKKA
Counsel for Petitioners